DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 08-1332
Title: City of Ontario, California, et al., Petitioners
v.
Jeff Quon, et al.
Docketed: April 29, 2009
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (07-55282)
Decision Date: June 18, 2008
Rehearing Denied: January 27, 2009
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Apr 27 2009	Petition for a writ of certiorari filed. (Response due May 29, 2009)
May 6 2009	Waiver of right of respondent Debbie Glenn to respond filed.
May 29 2009	Brief amici curiae of League of California Cities, et al. filed.
Jun 1 2009	Waiver of right of respondents Jeff Quon, et al. to respond filed.
Jul 15 2009	DISTRIBUTED for Conference of September 29, 2009.
Sep 3 2009	Response Requested . (Due October 5, 2009)
Sep 17 2009	Order extending time to file response to petition to and including November 4, 2009.
Nov 4 2009	Brief of respondents Jeff Quon, et al. in opposition filed. VIDED.
Nov 13 2009	Reply of petitioners City of Ontario, California, et al. filed. (Distributed)
Nov 17 2009	DISTRIBUTED for Conference of December 4, 2009.
Dec 7 2009	DISTRIBUTED for Conference of December 11, 2009.
Dec 14 2009	Petition GRANTED.
Jan 8 2010	The time within which to file the joint appendix and petitioners' brief on the merits is extended to and including February 5, 2010.
Feb 5 2010	Joint appendix filed (Statement of costs filed)
Feb 5 2010	Brief of petitioners City of Ontario, California, et al. filed.
Feb 11 2010	Brief amici curiae of League of California Cities, et al. filed.
Feb 12 2010	Brief amicus curiae of United States in support of reversal filed.
Feb 12 2010	Brief amicus curiae of Los Angeles Times Communications LLC, et al. filed.
Feb 12 2010	Brief amici curiae of National League of Cities, et al. filed.
Feb 12 2010	Brief amici curiae of National School Boards Association, et al. filed.
Feb 16 2010	SET FOR ARGUMENT ON Monday, April 19, 2010.

Feb 26 2010	The time within which to file respondents' briefs on the merits is extended to and including March 16, 2010.
Mar 5 2010	CIRCULATED.
Mar 5 2010	Record received from U.S.C.A. for 9th Circuit. (1 envelope)
Mar 10 2010	U.S.D.C. for Central District of California record received from Judge Wardlaw of the U.S.C.A. for 9th Circuit. (3 boxes)
Mar 12 2010	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Mar 16 2010	Brief of respondents Jeff Quon, et al. filed. (Distributed)
Mar 23 2010	Brief amici curiae of Electronic Frontier Foundation, et al. filed. (Distributed)
Mar 23 2010	Brief amicus curiae of New York Intellectual Property Law Association filed. (Distributed)
Mar 23 2010	Brief amici curiae of Electronic Privacy Information Center, et al. filed. (Distributed)
Mar 23 2010	Brief amicus curiae of American Federation of Labor and Congress of Industrial Organizations . filed. (Distributed)
Mar 23 2010	Motion for leave to file amicus brief filed by The Rutherford Institute.
Apr 5 2010	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Apr 5 2010	Motion for leave to file amicus brief filed by The Rutherford Institute GRANTED.
Apr 12 2010	Reply of petitioners City of Ontario, California, et al. filed. (Distributed)
Apr 19 2010	Argued. For petitioners: Kent L. Richland, Los Angeles, Cal.; and Neal K. Katyal, Deputy Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.) For respondents: Dieter Dammeier, Upland, Cal.

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED
APR 27 2009
OFFICE OF THE CLERK

No. 08-1332

In The

Supreme Court of the United States

CITY OF ONTARIO, ONTARIO POLICE DEPARTMENT, and LLOYD SCHARF,

Petitioners,

v.

JEFF QUON, JERILYN QUON, APRIL FLORIO, and STEVE TRUJILLO,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

While individuals do not lose Fourth Amendment rights merely because they work for the government, some expectations of privacy held by government employees may be unreasonable due to the "operational realities of the workplace." *O'Connor v. Ortega*, 480 U.S. 709, 717 (1987) (plurality). Even if there exists a reasonable expectation of privacy, a warrantless search by a government employer – for non-investigatory work-related purposes or for investigations of work-related misconduct – is permissible if reasonable under the circumstances. *Id.* at 725-26 (plurality). The questions presented are:

1. Whether a SWAT team member has a reasonable expectation of privacy in text messages transmitted on his SWAT pager, where the police department has an official no-privacy policy but a non-policymaking lieutenant announced an informal policy of allowing some personal use of the pagers.

2. Whether the Ninth Circuit contravened this Court's Fourth Amendment precedents and created a circuit conflict by analyzing whether the police department could have used "less intrusive methods" of reviewing text messages transmitted by a SWAT team member on his SWAT pager.

3. Whether individuals who send text messages to a SWAT team member's SWAT pager have a reasonable expectation that their messages will be free from review by the recipient's government employer.

PARTIES TO THE PROCEEDING

Petitioners (defendants and appellees below):

CITY OF ONTARIO, ONTARIO POLICE DEPARTMENT, and LLOYD SCHARF

Respondents (plaintiffs and appellants below):

JEFF QUON, JERILYN QUON, APRIL FLORIO, and STEVE TRUJILLO

Additional defendants and appellees below:

DEBBIE GLENN

ARCH WIRELESS OPERATING COMPANY, INCORPORATED

Additional plaintiff below:

DOREEN KLEIN

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Jennifer Ordoñez, *They Can't Hide Their Pryin' Eyes – An Appeals Court Ruling Makes It More Difficult For Employers To Sniff Around In Workers' Electronic Communications*, Newsweek, July 14, 2008 12

Petitioners City of Ontario, Ontario Police Department, and Lloyd Scharf (collectively, Ontario defendants) respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit's opinion is reported at 529 F.3d 892 (9th Cir. 2008). App., *infra*, 1-40. Its order denying rehearing and rehearing en banc, including a one-judge concurring opinion and a seven-judge dissenting opinion, is reported at 554 F.3d 769 (9th Cir. 2009). App., *infra*, 124-150. The opinion of the United States District Court for the Central District of California is reported at 445 F. Supp. 2d 1116 (C.D. Cal. 2006). App., *infra*, 41-116.

JURISDICTION

The Ninth Circuit issued its decision on June 18, 2008. App., *infra*, 1. Petitioners timely filed a petition for rehearing and rehearing en banc, which was denied on January 27, 2009, with one judge concurring in and seven judges dissenting from the denial of rehearing en banc. App., *infra*, 124-125, 136. This Court has jurisdiction under 28 U.S.C. section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the placed to be searched, and the persons or things to be seized. U.S. Const. amend. IV.

Section 1983 of Title 42 of the United States Code provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to

the District of Columbia shall be considered to be a statute of the District of Columbia. 42 U.S.C. § 1983.

STATEMENT OF THE CASE

1. Ontario Police Department SWAT team Sergeant Jeff Quon used his Department-issued text-messaging pager to exchange hundreds of personal messages – many sexually explicit – with, among others, his wife (Jerilyn Quon), his girlfriend (April Florio), and a fellow SWAT team sergeant (Steve Trujillo). He did so notwithstanding the City of Ontario's written "Computer Usage, Internet and E-mail Policy" – which both Sergeants Quon and Trujillo acknowledged in writing – that permitted employees only limited personal use of City-owned computers and associated equipment, including e-mail systems, and warned them not to expect privacy in such use. App., *infra*, 151-157.

The City's written policy advised employees, among other things, that:

- "The use of these tools for personal benefit is a significant violation of City of Ontario Policy." App., *infra*, 152.
- "The use of any City-owned computer equipment, . . . e-mail services or other City computer related services for personal benefit or entertainment is

> prohibited, with the exception of 'light personal communications.'" *Id.*

The policy explained that "[s]ome incidental and occasional personal use of the e-mail system is permitted if limited to 'light' personal communications[,]" which "may consist of personal greetings or personal meeting arrangements." App., *infra*, 153.

As for privacy and confidentiality, the policy informed employees they should expect none:

- "The City of Ontario reserves the right to monitor and log all network activity including e-mail and Internet use, with or without notice. Users should have no expectation of privacy or confidentiality when using these resources." App., *infra*, 152.
- "Access to the Internet and the e-mail system is not confidential;. . . . As such, these systems should not be used for personal or confidential communications. Deletion of e-mail or other electronic information may not fully delete the information from the system." App., *infra*, 153.
- "[E-mail] messages are also subject to 'access and disclosure' in the legal system and the media." *Id.*

The policy additionally stated that "[t]he use of inappropriate, derogatory, obscene, suggestive, defamatory, or harassing language in the e-mail

system will not be tolerated." *Id.* When the Department obtained text-messaging pagers to facilitate logistical communications among SWAT team officers, it informed the officers that the e-mail policy applied to pager messages. App., *infra*, 5, 29, 48.

Under the City's contract with its wireless provider – Arch Wireless Operating Company, Inc. – each pager had a monthly character limit, above which the City had to pay extra. App., *infra*, 6, 45. The officer in charge of administration of the pagers – Lieutenant Steve Duke – had an informal arrangement whereby he would not audit pagers that had exceeded the monthly character limit if the officers agreed to pay for any overages. App., *infra*, 6-8, 29-30. Certain officers, including Sergeant Quon, repeatedly exceeded the character limit. *See* App., *infra*, 8, 50-51. In response to Lieutenant Duke's report that he was tired of being a bill collector, the Chief of Police ordered a review of the pager transcripts for the two officers with the highest overages – one of whom was Sergeant Quon – to determine whether the City's monthly character limit was insufficient to cover business-related messages. App., *infra*, 8, 51. The Department then obtained the pager transcripts for the two officers from Arch Wireless. App., *infra*, 8-9.

After initial Department review, the matter was referred to internal affairs to determine whether Sergeant Quon was wasting time attending to personal issues while on duty. App., *infra*, 9. Sergeant

Patrick McMahon, of internal affairs, with the help of Sergeant Debbie Glenn, redacted the transcripts to eliminate messages that did not occur on duty. App., *infra*, 9, 56; *see also* Supplemental Excerpts of Record ("SER") 251. During the month under review, Sergeant Quon sent and received 456 personal messages while on duty – on average per shift, 28 messages, only 3 of which were business related. SER 254; *see also* App., *infra*, 54-55. "Some of these messages were directed to or from his wife, [plaintiff] Jerilyn Quon," who was a former Department employee, "while others were directed to and from his mistress, [plaintiff April] Florio," who was a police dispatcher. App., *infra*, 54-55; *see also* SER 303, 307. Many of their text messages were not "light personal communications," as defined in the policy, but rather were, in the district court's words, "to say the least, sexually explicit in nature." App., *infra*, 54; *see also* SER 532, 539, 546.

2. Sergeant Quon and his text-messaging partners sued the Chief of Police, the City, the Department, and others, alleging Fourth Amendment violations under 42 U.S.C. section 1983. *See* App., *infra*, 58.[1] On cross-motions for summary judgment, the district court first held that Sergeant Quon had a reasonable expectation of privacy in his pager

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[1] Plaintiffs made other claims and sued other defendants, including a separately represented police sergeant – Debbie Glenn – and Arch Wireless. *See* App., *infra*, 58. For brevity's sake, we do not discuss those claims.

transcripts as a matter of law under the "operational realities of the workplace" standard from *O'Connor v. Ortega*, 480 U.S. 709, 717 (1987) (plurality). App., *infra*, 88-97. The court based its decision on Lieutenant Duke's informal policy that "he would *not* audit their pagers so long as they agreed to pay for any overages." App., *infra*, 90 (emphasis in original).

The court next considered whether reviewing the transcripts was reasonable under the circumstances. App., *infra*, 97. It determined there was a genuine issue of material fact as to "the actual *purpose* or *objective* Chief Scharf sought to achieve." *Id.* (emphasis in original). The court reasoned that the transcript review was *not* reasonable if it "was meant to ferret out misconduct by determining whether the officers were 'playing games' with their pagers or otherwise 'wasting a lot of City time conversing with someone about non-related work issues.'" App., *infra*, 98. But the court reasoned the transcript review *was* reasonable if the purpose was to "determin[e] the utility or efficacy of the existing monthly character limits." App., *infra*, 99. The court also determined that the scope of the audit was reasonable for the purpose of determining the efficacy of the character limit. App., *infra*, 103.

Denying summary judgment, the district court ruled that a jury would decide "which was the primary purpose of the audit." *Id.* The court also rejected Chief Scharf's qualified immunity defense, reasoning that if the jury found that he "order[ed] the audit, under the guise of seeking to ferret out

misconduct," he would not be entitled to qualified immunity. App., *infra*, 104, 108.

A jury found that Chief Scharf's purpose in ordering review of the transcripts was to determine the character limit's efficacy. App., *infra*, 119. As a result, the district court ruled that there was no Fourth Amendment violation, and judgment was entered in favor of defendants. App., *infra*, 119-120.

3. Plaintiffs appealed. On appeal, Ontario defendants argued that they should have been granted summary judgment in their favor because, as a matter of law, plaintiffs had no reasonable expectation of privacy and the search was reasonable under either purpose submitted to the jury.

The Ninth Circuit reversed, in an opinion authored by Judge Wardlaw and joined by Judge Pregerson and District Judge Leighton (sitting by designation). The panel ruled that plaintiffs were entitled to summary judgment in their favor against the City and the Department. App., *infra*, 40. Applying the *O'Connor* plurality's "operational realities of the workplace" standard, 480 U.S. at 717, the panel concluded Sergeant Quon had a reasonable expectation of privacy because of Lieutenant Duke's informal policy of allowing officers to pay for overages. App., *infra*, 29.

The panel also held that the other three plaintiffs had a reasonable expectation of privacy in messages they had sent to Sergeant Quon's pager, but not based on Lieutenant Duke's bill-paying arrangement. App.,

infra, 27 n.6. Rather, analogizing text messages to e-mail messages, regular mail, and telephone communications, App., *infra*, 23-28, it concluded that, "[a]s a matter of law, Trujillo, Florio, and Jerilyn Quon had a reasonable expectation that the Department would not review their messages absent consent from either a sender or recipient of the text messages." App., *infra*, 28-29.

In evaluating the reasonableness of the search under the *O'Connor* framework, the panel concluded that given the jury's special verdict that the purpose of the search was administrative – to determine the character limit's efficacy – the search was reasonable at its inception to ensure that officers were not being required to pay for work-related expenses. App., *infra*, 33-34. Nevertheless, relying on *Schowengerdt v. General Dynamics Corp.*, 823 F.2d 1328, 1336 (9th Cir. 1987), the panel reasoned that if "less intrusive methods" were feasible, then the search was unreasonable. App., *infra*, 35. The panel hypothesized that there were "a host of simple ways" the Department could have conducted its administrative investigation without intruding on plaintiffs' Fourth Amendment rights. *Id.* The panel therefore concluded that the search violated the Fourth Amendment as a matter of law. App., *infra*, 36, 39.

The panel determined, however, that Chief Scharf was entitled to qualified immunity because "there was no clearly established law regarding whether users of text-messages that are archived, however temporarily, by the service provider have a

reasonable expectation of privacy in those messages." App., *infra*, 37-38.

4. The City and the Department petitioned for panel rehearing and rehearing en banc on the grounds that: (1) the panel's ruling on a government employee's reasonable expectation of privacy in text messaging on a government-issued pager dramatically undermined the "operational realities of the workplace" standard of *O'Connor*, 480 U.S. at 717 (plurality); (2) the panel erroneously extended Fourth Amendment protection with its sweeping ruling that individuals who send text messages to a government employee's workplace pager – rather than to a privately owned pager – reasonably expect that their messages will be free from the employer's review; and (3) the panel's reliance on *Schowengerdt*'s "less intrusive methods" analysis required review to secure uniformity of the court's decisions in light of this Court's and other circuits' authorities "repeatedly" rejecting the "existence of alternative 'less intrusive' means" as a basis for evaluating the reasonableness of government activity under the Fourth Amendment, as exemplified in *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 629 n.9 (1989) (citations omitted) (collecting cases).

The United States filed an amicus curiae brief supporting the petition. App., *infra*, 158-180. CSAC Excess Insurance Authority – a California Joint Powers Authority representing 54 of California's 58 counties – sought leave to file an amicus curiae brief supporting the petition.

Panel rehearing and rehearing en banc were denied. App., *infra*, 125. However, Judge Ikuta, joined by six other judges, dissented from the denial of rehearing en banc. App., *infra*, 136-150. The dissent disagreed with the panel's conclusion that the search violated the Fourth Amendment for two main reasons:

- "First, in ruling that the SWAT team members had a reasonable expectation of privacy in the messages sent from and received on pagers provided to officers for use during SWAT emergencies, the panel undermines the standard established by the Supreme Court in *O'Connor v. Ortega*, 480 U.S. 709 (1987), to evaluate the legitimacy of non-investigatory searches in the workplace." App., *infra*, 136-137.

- "Second, the method used by the panel to determine whether the search was reasonable conflicts with binding Supreme Court precedent, in which the Court has repeatedly held that the Fourth Amendment does not require the government to use the 'least intrusive means' when conducting a 'special needs' search. *See Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822, 837 (2002); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 663 (1995); *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602,

629 n.9 (1989)." App., *infra*, 137 (parallel citations omitted).

Judge Wardlaw filed an opinion concurring in the denial of rehearing en banc, arguing that the dissent was mistaken as to the facts and the law. App., *infra*, 125-136. No other judges joined the concurrence.

REASONS TO GRANT THE PETITION

The Ninth Circuit panel viewed "[t]he recently minted standard of electronic communication via e-mails, text messages, and other means" as "open[ing] a new frontier in Fourth Amendment jurisprudence that has been little explored." App., *infra*, 23-24. The panel's opinion literally "wowed" privacy advocates,[2] and it surprised more mainstream media.[3] For good

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[2] *E.g.*, Jennifer Granick, *New Ninth Circuit Case Protects Text Message Privacy from Police and Employers*, Electronic Frontier Foundation, June 18, 2008, http://www.eff.org/deeplinks/2008/06/new-ninth-circuit-case-protects-text-message-priva ("[E]ven if your employer pays for your use of third party text or email services, your boss can't get copies of your messages from that provider without your permission. Wow.").

[3] *E.g.*, Jennifer Ordoñez, *They Can't Hide Their Pryin' Eyes – An Appeals Court Ruling Makes It More Difficult For Employers To Sniff Around In Workers' Electronic Communications*, Newsweek, July 14, 2008, at 22 ("For desk jockeys everywhere, it has become as routine as a tour of the office-supply closet: the consent form attesting that you understand and accept that any e-mails you write, Internet sites you visit or business you conduct on your employer's computer network are subject to inspection.").

reason: public and private employers alike typically have in place policies establishing that employees should have no expectation of privacy in electronic communications and other computer usage on employer-owned equipment. As the United States explained in its amicus brief in the Ninth Circuit, these policies are intended to "prevent abuse and promote the public's safety and security." App., *infra*, 162-163.

The opinion dissenting from the denial of rehearing en banc summarized that

> [b]y holding that a SWAT team member has a reasonable expectation of privacy in the messages sent to and from his SWAT pager, despite an employer's express warnings to the contrary and "operational realities of the workplace" that suggest otherwise, and by requiring a government employer to demonstrate that there are no . . . less intrusive means available to determine whether its wireless contract was sufficient to meet its needs, the panel's decision is contrary to "the dictates of reason and common sense" as well as the dictates of the Supreme Court.

App., *infra*, 149-150.

The dissenting judges were right. To warrant Fourth Amendment protection, a government employee's expectation of privacy must be one "'that society is prepared to consider reasonable'" under the "operational realities of the workplace." *O'Connor v.*

Ortega, 480 U.S. 709, 715, 717 (1987) (plurality) (citation omitted). Concluding that a government employee has a reasonable expectation of privacy in text messages sent and received on a pager issued by his employer, the Ninth Circuit panel mistakenly reasons that the employer's explicit no-privacy policy is abrogated by a lower-level supervisor's informal arrangement allowing some personal use of the pager, and discounts entirely the potential disclosure of the messages under public records laws. As the dissent notes: "In doing so, the panel improperly hobbles government employers from managing their workforces." App., *infra*, 137.

And in holding that the scope of the government employer's administrative review of transcripts of the employee's text messages was unreasonable, the Ninth Circuit relied on a "less intrusive methods" analysis that this Court and multiple other circuits have repeatedly rejected as a basis for evaluating the reasonableness of government activity under the Fourth Amendment. *E.g.*, *Skinner*, 489 U.S. at 629 n.9 (citations omitted). The panel's "less intrusive methods" approach not only conflicts with this Court's and other circuits' authority, but also, as the dissent discerns, "makes it exceptionally difficult for public employers to go about the business of running government offices." App., *infra*, 137.

Making matters worse, the Ninth Circuit extends Fourth Amendment protection beyond any reasonable parameters by concluding that even individuals who knowingly send text messages *to* a government

employee's *workplace* pager – rather than to a privately owned pager – reasonably expect that their messages will be free from the recipient's employer's review. App., *infra*, 28. The panel thus further hobbles employers' ability to monitor electronic communications and enforce no-confidentiality policies.

Below we demonstrate that certiorari should be granted (a) to restore reasonableness to the *O'Connor* "operational realities of the workplace standard" as it applies to expectations of privacy in electronic communications in the workplace; (b) to settle once and for all the split among the circuits on the applicability of a "less-intrusive means" analysis under the Fourth Amendment; and (c) to curb the Ninth Circuit's startling extension of Fourth Amendment privacy rights to individuals who send electronic communications to government employees' government-issued communications devices.

Simply put, the SWAT team sergeant failed to comport himself as a reasonable officer would have, and he and the other plaintiffs embarrassed themselves through their lack of restraint in using a City-owned pager for personal and highly private communications. The City of Ontario should not have to pay for that in this case, nor should other government employers be hobbled by the Ninth Circuit's ruling. Certiorari should be granted.

I. THE NINTH CIRCUIT OPINION UNDERMINES THE "OPERATIONAL REALITIES OF THE WORKPLACE" STANDARD FOR MEASURING FOURTH AMENDMENT PROTECTION IN GOVERNMENT WORKPLACES BY ERRONEOUSLY HOLDING THAT A POLICE LIEUTENANT'S INFORMAL POLICY CREATES A REASONABLE EXPECTATION OF PRIVACY IN TEXT MESSAGING ON A POLICE DEPARTMENT PAGER IN THE FACE OF THE DEPARTMENT'S EXPLICIT NO-PRIVACY POLICY AND POTENTIAL DISCLOSURE OF THE MESSAGES AS PUBLIC RECORDS.

The Department had a written no-privacy policy for e-mail and computer use, Sergeant Quon signed an acknowledgment of it, and he attended a meeting at which it was made clear that the policy fully applied to the pagers. App., *infra*, 29, 156; *see also* SER 320, 463-64.) "If that were all," the Ninth Circuit panel reasoned, the case would be governed by the rule that employees have no reasonable expectation of privacy where they have notice of employer policies permitting searches. App., *infra*, 29 (citing *Muick v. Glenayre Elecs.*, 280 F.3d 741, 743 (7th Cir. 2002) and *Bohach v. City of Reno*, 932 F. Supp. 1232, 1234-35 (D. Nev. 1996)). To that point, the panel's reasoning is a straightforward application of *O'Connor*'s "operational realities of the workplace" standard, to which government employers and employees have become accustomed. *See, e.g., Biby v. Bd. of Regents*,

419 F.3d 845, 850-51 (8th Cir. 2005); *United States v. Angevine*, 281 F.3d 1130, 1134-35 (10th Cir. 2002); *United States v. Simons*, 206 F.3d 392, 398 (4th Cir. 2000).

But the panel concluded that "such was not the 'operational reality' at the Department" because "'Lieutenant Duke made it clear to the staff, and to Quon in particular, that he would *not* audit their pagers so long as they agreed to pay for any overages.'" App., *infra*, 30. Here the panel mistakenly relied on Lieutenant Duke's informal accommodation – in the face of the Department's express policy – as determinative of whether an expectation of privacy in the text messages was reasonable.

The district court aptly characterized Lieutenant Duke's bill-paying arrangement as his "generous way of streamlining administration and oversight over the use of the pagers because, as he reminded [Sergeant] Quon, he could, 'if anybody wished to challenge their overage, . . . audit the text transmissions to verify how many were non-work related.'" App., *infra*, 50. Given the official, explicit, Department-wide "no privacy" policy as to all electronic communications, an officer could not reasonably interpret Lieutenant Duke's informal policy to mean that the Department would never review messages sent on the Department's pagers without first getting the officer's additional consent.

As the panel acknowledged, but dismissed as unimportant, Lieutenant Duke was not a Department

policymaker. App., *infra*, 31. Thus, holding the City and Department liable based on Lieutenant Duke's informal policy amounts to an end-run around well-established principles that only official policies or acts of official policymakers may give rise to municipal liability under 42 U.S.C. section 1983. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988); *Monell v. Dep't of Soc. Services*, 436 U.S. 658, 694 (1978); *see also Bennett v. City of Eastpointe*, 410 F.3d 810, 819 (6th Cir. 2005) (plaintiffs could not base section 1983 claims on memorandum that had been written by current police chief when he "was simply a lieutenant, and not a policy-making official").

The thousands of government offices throughout the nation have supervisors like Lieutenant Duke attempting to oversee employees' use of a seemingly never-ending stream of new technologies, from e-mailing to text messaging to instant messaging to using Twitter. It simply isn't realistic to avoid informal statements that arguably contradict formal no-privacy policies. But that squarely raises the issue of whether it is reasonable under the Fourth Amendment for government employees to ignore official, explicit no-privacy policies to the contrary.

Within the operational realities of a police department, the answer is certainly no. "Given that the pagers were issued for use in SWAT activities, which by their nature are highly charged, highly visible situations, it is unreasonable to expect that messages sent on pagers provided for communication among SWAT team members during those

emergencies would not be subsequently reviewed by an investigating board, subjected to discovery in litigation arising from the incidents, or requested by the media." App., *infra*, 142 (Ikuta, J., dissenting from denial of rehearing en banc.). "The public expects [police] officers to behave with a high level of propriety, and, unsurprisingly, is outraged when they do not do so." *Dible v. City of Chandler*, 515 F.3d 918, 928 (9th Cir. 2008). A reasonable police officer understands these operational realities and thus cannot reasonably expect privacy in text messages on a Department-issued pager, particularly messages sent while on duty.

A related operational reality is the public's potential access to the pager transcripts under the California Public Records Act ("CPRA") (Cal. Gov't Code § 6250, *et seq.*). The panel reasoned that the CPRA would not preclude a reasonable expectation of privacy – even if the pager messages were public records – absent evidence that CPRA requests were sufficiently "'widespread or frequent.'" App., *infra*, 32. But that misses the point. As the judges dissenting from denial of rehearing en banc correctly discerned, "[g]overnment employees in California are well aware that every government record is potentially discoverable at the mere request of a member of the public, and their reasonable expectation of privacy in such public records is accordingly reduced." App., *infra*, 142-143.

Whether an expectation of privacy was objectively reasonable must be evaluated under the

totality of these operational realities, not by ignoring the City's no-privacy policy and by downplaying the potential for public disclosure. Permitting informal accommodations for some personal use to trump government employers' explicit no-privacy policies threatens to disembowel the "operational realities" standard. In its amicus curiae brief in the Ninth Circuit, the United States warned that the panel's error in relying on the informal policy of a non-policymaker "puts into doubt employee agreements and privacy policies used across the private sector and government to assist internal investigators in identifying possible corruption, threats to security, or abuse of government resources or authority." App., *infra*, 172-173.

And, with the panel's opinion extant, government employers would be wise to curtail *any* flexibility in electronic communications policies in order to maintain the viability of no-privacy policies. This Court therefore should take this opportunity to restore reasonableness and common sense to *O'Connor*'s "operational realities of the workplace" standard.

II. THE NINTH CIRCUIT OPINION CONTRAVENES THIS COURT'S DECISIONS AND CREATES A SPLIT AMONG THE CIRCUITS ON WHETHER A "LESS INTRUSIVE MEANS" ANALYSIS MAY BE APPLIED TO DETERMINE WHETHER A SEARCH IS REASONABLE UNDER THE FOURTH AMENDMENT.

This Court has "repeatedly" rejected the "existence of alternative 'less intrusive' means" as a basis for evaluating the reasonableness of government activity under the Fourth Amendment. *Skinner*, 489 U.S. at 629 n.9 (collecting cases) (citations omitted). "It is obvious that the logic of such elaborate less-restrictive-alternative arguments could raise insuperable barriers to the exercise of virtually all search-and-seizure powers . . . because judges engaged in post hoc evaluations of government conduct can almost always imagine some alternative means by which the objectives of the government might have been accomplished." *Id.* (internal citations and quotations omitted).

Until this panel opinion, the circuit courts uniformly heeded this Court's admonitions. The opinion dissenting from the denial of rehearing en banc points out – and the concurring opinion does not contest – that "[s]even other circuits have followed the Supreme Court's instruction and explicitly rejected a less intrusive means inquiry in the Fourth Amendment context." App., *infra*, 147-149 (citing *Davenport v. Causey*, 521 F.3d 544, 552 (6th Cir.

2008); *Lockhart-Bembery v. Sauro*, 498 F.3d 69, 76 (1st Cir. 2007); *Cassidy v. Chertoff*, 471 F.3d 67, 79 (2d Cir. 2006); *Shell v. United States*, 448 F.3d 951, 956 (7th Cir. 2006); *United States v. Prevo*, 435 F.3d 1343, 1348 (11th Cir. 2006); *Shade v. City of Farmington*, 309 F.3d 1054, 1061 (8th Cir. 2002); *United States v. Melendez-Garcia*, 28 F.3d 1046, 1052 (10th Cir. 1994)). The panel opinion, however, creates a split in the circuits by reintroducing a "less intrusive means" analysis into Fourth Amendment jurisprudence.

The opinion concurring in the denial of rehearing en banc argues that the panel did not actually engage in a less intrusive means analysis, but as the dissent notes, the panel opinion "does exactly" that. App., *infra*, 145.

- The panel quoted the Ninth Circuit's opinion in *Schowengerdt v. General Dynamics Corp.*, 823 F.2d 1328 (9th Cir. 1987), for the proposition that "'if less intrusive methods were feasible, . . . the search would be unreasonable.'" App., *infra*, 35 (quoting *Schowengerdt*, 823 F.2d at 1336).

- The panel posited that "[t]here were a host of simple ways to verify the efficacy of the 25,000 character limit (if that, indeed, was the intended purpose) without intruding on [plaintiffs'] Fourth Amendment rights." App., *infra*, 35.

- The panel provided examples that were never even suggested by plaintiffs. *Id.*

It is difficult to understand how this approach could *not* be considered a "less intrusive means" test.

As the dissent from the denial of rehearing cogently observed, "[r]ather than evaluate whether the search '*actually* conducted' by the police department was 'reasonably related to the objectives of the search and not excessively intrusive in light of [its purpose], as *O'Connor* requires us to do, 480 U.S. at 726, . . . (emphasis added), the panel looks at what the police department *could* have done." App., *infra*, 145 (parallel citation omitted). The panel thus engaged in precisely the kind of "post-hoc exercise of imagining some other path of conduct the government could have taken," *Taylor v. O'Grady*, 888 F.2d 1189, 1195 (7th Cir. 1989), or "'Monday morning quarterbacking[,]'" *Shade*, 309 F.3d at 1061, that other circuits have concluded is not permissible under this Court's Fourth Amendment jurisprudence.

The opinion concurring in the denial of rehearing en banc also suggests that this Court's prohibition against using a "less intrusive means" analysis applies only to "special needs" searches and states that this case did *not* involve a 'special needs' search." App., *infra*, 135 (citation omitted). The concurrence is wrong on both points.

First, even though cases in which this Court has rejected the "least restrictive means" mode of analysis "have often involved circumstances in which the

government had engaged in 'years of investigation and study' that resulted in 'reasonable conclusions' that the government conduct was necessary," App., *infra*, 135 (citing *Skinner*, 489 U.S. at 629 n.9), many such cases have *not* involved elaborate deliberative processes. *E.g.*, *United States v. Sharpe*, 470 U.S. 675, 686-87 (1985) (20-minute *Terry* stop of pickup truck driver by DEA agent); *Illinois v. Lafayette*, 462 U.S. 640, 647 (1983) (administrative search of arrestee's personal effects at police station); *Cady v. Dombrowski*, 413 U.S. 433, 447 (1973) (warrantless search of car trunk). Nor have other circuits read this Court's precedents in such a limited manner. *E.g.*, *Lockhart-Bembery*, 498 F.3d at 71, 76 (police officer giving routine police assistance to disabled motorist whose car posed a traffic hazard on a busy road and ordering motorist to move car); *Shade*, 309 F.3d at 1057, 1061 (police officer's pat-down search of student for knife); *Melendez-Garcia*, 28 F.3d at 1052 (*Terry* stop of automobile to search for drugs).

Second, this Court in *O'Connor* expressly concluded that public employer searches *are* "special needs" searches: "In sum, we conclude that the 'special needs, beyond the normal need for law enforcement make the . . . probable-cause requirement impracticable,' . . . for legitimate work-related, noninvestigatory intrusions as well as investigations of work-related misconduct are present in the context of government employment." 480 U.S. at 725 (plurality); *accord*, *id.* at 732 (Scalia, J., concurring in the judgment) ("'[S]pecial needs' are

present in the context of government employment.") As *O'Connor* explained, "public employers have a direct and overriding interest in ensuring that the work of the agency is conducted in a proper and efficient manner," and must be "given wide latitude" in carrying out administrative searches, which serve to "ensure the efficient and proper operation of the agency." 480 U.S. at 723-24 (plurality).

Far from giving the Department wide latitude, the panel expressly followed *Schowengerdt*, in which the Ninth Circuit had added a "less intrusive methods" and "no broader than necessary" gloss to the *O'Connor* analysis. 823 F.2d at 1336. But this gloss – in addition to conflicting with the opinions of the seven circuits listed above – is incompatible with *O'Connor* itself.

Further contravening *O'Connor*, the panel's suggested "less intrusive" means effectively require employees' consent (notwithstanding their agreement to the employer's no-privacy policy) for the employer to investigate at all. While valid consent may obviate a warrant or probable cause, 4 Wayne R. LaFave, *Search & Seizure* (4th ed. 2004) § 8.1, at 4-5 & n.9, probable cause is not needed for a public employer's search under *O'Connor*, 480 U.S. at 725 (plurality); *id.* at 732 (Scalia, J., concurring in the judgment).

Instead of hypothesizing "less intrusive" means, the panel should have "'balanc[ed] [the search's] intrusion on the individual's Fourth Amendment interests against its promotion of legitimate

governmental interests.'" *Vernonia*, 515 U.S. at 652-53 (citations omitted). But the panel failed to balance the interests: It didn't weigh the plaintiffs' interests in using Sergeant Quon's *Department-issued* pager for personal communications – even highly private, sexually graphic ones – while he was on duty, *see* SER 532, 539, 546, against the Department's "direct and overriding interest in ensuring that the work of the agency is conducted in a proper and efficient manner." 480 U.S. at 724 (plurality); *see also Dible*, 515 F.3d at 928 ("[T]he interest of the City in maintaining the effective and efficient operation of the police department is particularly strong.").

The panel opinion gives no recognition to *O'Connor*'s teaching that "privacy interests of government employees in their place of work . . . are far less than those found at home or in some other contexts." *O'Connor*, 480 U.S. at 725 (plurality). Just as the *O'Connor* plurality explained that "[t]he employee may avoid exposing personal belongings at work by simply leaving them at home," *id.*, the opinion dissenting from the denial of rehearing en banc in this case aptly explains that "Quon could have avoided exposure of his sexually explicit text messages simply by using his own cell phone or pager." App., *infra*, 143. The City and Department should not be punished because a legitimate workplace search happened to turn up sexually explicit messages that plaintiffs need not and should not have sent on government-issued equipment in the first place. *Cf. Simons*, 206 F.3d at 400 (government

employer "did not lose its special need for 'the efficient and proper operation of the workplace' [under *O'Connor*] merely because the evidence obtained was evidence of a crime").

In fact, as Ontario defendants argued in the Ninth Circuit, the transcript review was reasonable even if Chief Scharf's purpose in ordering it was to investigate misconduct. Under *O'Connor*, even if there exists a reasonable expectation of privacy, a warrantless search may be legal if it is both work-related – for example to investigate work-related misconduct – and reasonable under the circumstances. 480 U.S. at 724-25 (plurality); *id.* at 732 (Scalia, J., concurring in the judgment).[4]

Put simply, "the relevant question is whether th[e] intrusion upon privacy is one that a reasonable employer might engage in." *Vernonia*, 515 U.S. at 665

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[4] The opinion concurring in the denial of rehearing en banc contends the City did not file its own appeal and "for reasons of its own, was quite content to have the jury find a legitimate purpose for Chief Scharf's search." App., *infra*, 131. However, the concurrence omits that the City argued that the Ninth Circuit should affirm on the alternative grounds that the City was entitled to *summary judgment in its favor* because, as a matter of law, plaintiffs had no reasonable expectation of privacy and the review of the pager transcripts was reasonable under *either* purpose submitted to the jury by the District Court. The City relied on the "firmly entrenched rule" that, even without cross-appealing, an appellee may assert any ground for affirmance that is apparent on the record as long as the appellee does not seek to enlarge the relief obtained below. *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 479-80 (1999).

(citing *O'Connor*). Here, the answer is yes. But the panel's decision encourages government employees to act unreasonably and prevents government employers – even ones with explicit no-privacy policies – from undertaking reasonable searches without the employees' further consent.

III. THE NINTH CIRCUIT OPINION EXTENDS FOURTH AMENDMENT PROTECTION BEYOND REASONABLE LIMITS BY HOLDING THAT INDIVIDUALS SENDING TEXT MESSAGES TO A GOVERNMENT EMPLOYEE'S GOVERNMENT-ISSUED PAGER HAVE A REASONABLE EXPECTATION OF PRIVACY.

The Ninth Circuit's sweeping holding that plaintiffs Trujillo, Florio, and Jerilyn Quon reasonably expected that their messages to Sergeant Quon would be free from Department review is mistaken and further damages government employers' ability to effectively use and monitor communications equipment.

The panel began by asserting that "[t]he extent to which the Fourth Amendment provides protection for the contents of electronic communications in the Internet age is an open question." App., *infra*, 23. Next the panel framed the issue as if these plaintiffs had sent text messages to Sergeant Quon on his personal pager and as if he had his own account with Arch Wireless, ignoring the fact that they had sent the messages to a police officer on his Department-issued pager. *See* App., *infra*, 24 ("Do users of text

messaging services such as those provided by Arch Wireless have a reasonable expectation of privacy in their text messages stored on the service provider's network?"). With respect to these plaintiffs, as opposed to Sergeant Quon, the panel expressly did *not* rely on Lieutenant Duke's bill-paying arrangement, App., *infra*, 27 n.6, and the opinion is silent as to their knowledge of it. In fact, the panel fails to account for the fact that the other plaintiffs were fully aware that they were sending messages to Sergeant Quon's Department-issued pager.[5]

Analogizing text messages to telephone calls, regular mail, and e-mail, the panel broadly held that plaintiffs had a reasonable expectation of privacy in the content of messages they sent to Sergeant Quon such that their consent or his consent was required for the Department to review the messages. *See* App.,

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[5] Sergeant Trujillo was a fellow member of the SWAT team and also using a Department-issued pager himself. *See* App., *infra*, 2, 5. Police dispatcher April Florio and Sergeant Quon's wife, Jerilyn Quon, were using their own personal pagers but knew that Sergeant Quon's pager was issued by the Department. SER 303-04, 307. The panel opinion drew no distinctions among them, treating all three essentially as if they were third parties sending text messages to Sergeant Quon. As the United States pointed out, "[t]hough the panel stated that it did 'not endorse a monolithic view of text message users' reasonable expectation of privacy, as this is necessarily a context-sensitive inquiry,' the panel discussed few contextual facts other than whether Quon 'voluntarily permitted the Department to review his text messages.'" App., *infra*, 164-165 (quoting the panel opinion at App., *infra*, 28).

infra, 24-28. But whether users of text messaging *generally* have a reasonable expectation of privacy in the content of text messages is not the issue.[6] Neither the panel's reasoning nor the authorities it cited address a sender's expectation of privacy in communications sent to the recipient's *workplace* equipment – here a government employer's equipment.[7]

It is not objectively reasonable to expect privacy in a message sent to someone else's workplace pager, let alone to a police officer's department-issued pager. To have such an expectation, the sender would have to believe the recipient's employer does *not* have a no-privacy policy in place as to that employer's electronic communications equipment. That is *un*reasonable. As the United States aptly pointed out, "[n]ot only do

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[6] In its amicus brief supporting rehearing en banc, the United States pointed out additional problems with the panel's categorical determination that all users of text messaging have a reasonable expectation that their messages are private. App., *infra*, 163-171. Foremost, the United States argued that the panel's ruling was erroneous "because it made categorical conclusions about entire modes of communication without considering all relevant circumstances," and that "the Sixth Circuit, en banc, had recently rejected a similarly sweeping categorical conclusion about the privacy of e-mail." App., *infra*, 163 (citing *Warshak v. United States*, 532 F.3d 521, 527 (6th Cir. 2008) (en banc). The United States also argued that there generally is no reasonable expectation of privacy in text messages sent and received. App., *infra*, 177-180.

[7] None of the cases involving telephone calls, letters, e-mails, or computer usage cited by panel even addressed government employer searches; they addressed law enforcement searches. *See* App., *infra*, 24-28.

senders lack knowledge of what privacy policy applies to a recipient, but few actions demonstrate an expectation of privacy less than transmission of information to the work account of a public employee charged with enforcing the law." App., *infra*, 179.

Most employers have explicit no-privacy policies. "[T]he abuse of access to workplace computers is so common (workers being prone to use them as media of gossip, titillation, and other entertainment and distraction) that reserving a right of inspection is so far from being unreasonable that the failure to do so might well be thought irresponsible." *Muick*, 280 F.3d at 743; *see also TBG Ins. Servs. Corp. v. Superior Court*, 117 Cal. Rptr. 2d 155, 161-62, 96 Cal. App. 4th 443, 451 (2002) (finding no reasonable expectation of privacy in computer provided by employer for employee's home use and noting report that "more than three-quarters of this country's major firms monitor, record, and review employee communications and activities on the job, including their telephone calls, e-mails, Internet connections, and computer files").

In particular, "numerous government agencies," like the City of Ontario, have adopted "policies [that] typically require employees to acknowledge that their e-mail records are subject to inspection, monitoring, and public disclosure; that they have no right of privacy or any reasonable expectation of privacy in workplace e-mails; that the e-mails are owned by the agency, not the employee; and that e-mails are presumptively considered to be public records." Peter

S. Kozinets, *Access to the E-Mail Records of Public Officials: Safeguarding the Public's Right to Know*, 25-SUM Comm. Law. 17, 23 (2007). For example, the United States is "a public employer that extensively uses 'no confidentiality' policies with respect to the workplace and work-issued equipment." App., *infra*, 162.

The Ninth Circuit, however, ignored the prevalence of such policies. In fact, it even ignored the explicit policy in this case, concluding that "[h]ad Jeff Quon voluntarily permitted the Department to review his text messages, the remaining Appellants would have no claims." App., *infra*, 28. But Sergeant Quon *did* consent by signing the City's written policy.[8]

The panel failed to consider whether the senders' expectation of privacy is objectively reasonable for Fourth Amendment purposes in light of all these surrounding circumstances. Remarkably, the panel concluded that plaintiffs "prevail *as a matter of law*." App., *infra*, 40 (emphasis added). The panel's sweeping extension of Fourth Amendment protection threatens any government employer's ability to monitor even its *own* employees' electronic communications, which inevitably will include messages sent from third-party senders. The Ninth Circuit opinion thus further hamstrings public employers' ability to

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[8] Again, the panel relied on Lieutenant Duke's informal policy only when it addressed whether *Sergeant Quon* had a reasonable expectation of privacy. App., *infra*, 27 n.6.

prevent abuse and protect the integrity of workplace communications.

IV. THIS CASE PRESENTS AN EXCELLENT VEHICLE TO ADDRESS *O'CONNOR*'S APPLICATION TO NEW WORKPLACE TECHNOLOGIES; THERE IS NO BASIS FOR THE FACTUAL CONCERNS POSITED BY THE OPINION CONCURRING IN THE DENIAL OF REHEARING EN BANC.

As we have explained, there is no merit to the concurring opinion's criticisms of the legal analysis provided by the opinion dissenting from the denial of rehearing en banc. The concurrence also takes the dissent to task for supposedly taking liberties with the facts of the case. App., *infra*, 125-131. But the record soundly refutes these criticisms as well. For example:

- The concurrence says "the record is clear that the City had no official policy governing the use of the pagers." App., *infra*, 127. But the panel opinion itself says that "Quon signed [the Department's general "Computer Usage, Internet and E-mail Policy"] and attended a meeting in which it was made clear that the Policy also *applied to use of the pagers*." App., *infra*, 29 (emphasis added); *see also* App., *infra*, 48 (district court noting meeting and also subsequent memorandum that memorialized meeting and was sent to

Sergeants Quon and Trujillo). What more does it take for a City to have an official policy governing pagers? As we discussed above, even the panel expressly acknowledged that the written policy would control if not for Lieutenant Duke's informal policy. App., *infra*, 29-30.[9]

- According to the concurrence, "[t]he record belies the dissent's assertion that the OPD officers were permitted to use the pagers only during SWAT emergencies." App., *infra*, 126. But the dissent did not make that assertion. Rather, the dissent said that the Department "obtained two-way pagers for its SWAT team members to enable better coordination, and more rapid and effective responses to emergencies," App., *infra*, 138; *see also* App., *infra*, 142, which not only comports with common sense but also is exactly what the district court found. App., *infra*, 45-46.

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[9] The panel's reasoning suggests that government employees can use a newly-acquired technology however they please unless and until the employer issues a policy expressly covering it and that it is not enough to inform the employees that existing policies cover new technologies. This notion is antithetical to the reasonableness standard of the Fourth Amendment and to the special needs of government employers articulated in *O'Connor*.

- The concurrence says the dissent ignores the jury's finding that Chief Scharf's purpose in having Lieutenant Duke audit Sergeant Quon's pager messages was to determine the efficacy of the Department's existing character limits. App., *infra*, 130. But the dissent did acknowledge that Chief Scharf ordered the audit "to determine whether the police department's contract with their service provider was sufficient to meet its needs for text messaging." App., *infra*, 139-140 (citing the panel opinion). If anything, it was the panel that was reluctant to accept the jury's verdict on this issue, hypothesizing other ways "to verify the efficacy of the 25,000 character limit (*if that, indeed, was the intended purpose*)." App., *infra*, 35 (emphasis added).

- The concurrence chides the dissent for stating that "Chief Scharf 'sent the matter to internal affairs for an investigation "to determine if someone was wasting . . . City time not doing work when they should be."'" App., *infra*, 130. But the dissent's statement is nearly *identical* to what the panel opinion said: "Chief Scharf referred the matter to internal affairs 'to determine if someone was wasting . . . City time not doing work when they should be.'" App., *infra*, 9; *see also* App., *infra*, 55 (district court stating same).

And while the concurring opinion emphasizes that the panel's holding was "fact-driven," App., *infra*, 126, most Fourth Amendment cases are. As the concurrence itself later states, the *O'Connor* "analysis is necessarily fact-driven." App., *infra*, 132. That is no reason for this Court to turn a blind eye on a circuit court opinion that seriously undermines Fourth Amendment jurisprudence on issues of great importance.

CONCLUSION

The petition for a writ of certiorari should be granted. Because the Ninth Circuit's ruling manifestly contravenes this Court's Fourth Amendment precedents, the Court should consider summary reversal.

Respectfully submitted.

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APRIL 2009

529 F.3d 892

United States Court of Appeals,
Ninth Circuit.

Jerilyn QUON; April Florio; Jeff Quon; Steve Trujillo, Plaintiffs-Appellants,
v.
ARCH WIRELESS OPERATING COMPANY, INCORPORATED, a Delaware corporation; City of Ontario, a municipal corporation; Lloyd Scharf, individually and as Chief of Ontario Police Department; Ontario Police Department; Debbie Glenn, individually and as a Sergeant of Ontario Police Department, Defendants-Appellees.
No. 07-55282.

Argued and Submitted Feb. 6, 2008.
Filed June 18, 2008.

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Bruce E. Disenhouse, Kinkle, Rodiger and Spriggs, Riverside, CA, for defendant-appellee Debbie Glenn.

John H. Horwitz, Schaffer, Lax, McNaughton & Chen, Los Angeles, CA, for defendant-appellee Arch Wireless, Inc.

Appeal from the United States District Court for the Central District of California; Stephen G. Larson, District Judge, Presiding. D.C. No. CV-03-00199-SGL.

Before: HARRY PREGERSON and KIM McLANE WARDLAW, Circuit Judges, and RONALD B. LEIGHTON,* District Judge.

WARDLAW, Circuit Judge:

This case arises from the Ontario Police Department's review of text messages sent and received by Jeff Quon, a Sergeant and member of the City of Ontario's SWAT team. We must decide whether (1) Arch Wireless Operating Company Inc., the company with whom the City contracted for text messaging services, violated the Stored Communications Act, 18 U.S.C. §§ 2701-2711 (1986); and (2) whether the City, the Police Department, and Ontario Police Chief Lloyd Scharf violated Quon's rights and the rights of those with whom he "texted" – Sergeant Steve Trujillo, Dispatcher April Florio, and his wife Jerilyn Quon[1] – under the Fourth Amendment to the United States Constitution and Article I, Section 1 of the California Constitution.

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* The Honorable Ronald B. Leighton, United States District Judge for the Western District of Washington, sitting by designation.

[1] Doreen Klein, a plaintiff below, has not filed an appeal.

I. FACTUAL BACKGROUND

On October 24, 2001, Arch Wireless ("Arch Wireless") contracted to provide wireless text-messaging services for the City of Ontario. The City received twenty two-way alphanumeric pagers, which it distributed to its employees, including Ontario Police Department ("OPD" or "Department") Sergeants Quon and Trujillo, in late 2001 or early 2002.

According to Steven Niekamp, Director of Information Technology for Arch Wireless:

> A text message originating from an Arch Wireless two-way alphanumeric text-messaging pager is sent to another two-way text-messaging pager as follows: The message leaves the originating pager via a radio frequency transmission. That transmission is received by any one of many receiving stations, which are owned by Arch Wireless. Depending on the location of the receiving station, the message is then entered into the Arch Wireless computer network either by wire transmission or via satellite by another radio frequency transmission. Once in the Arch Wireless computer network, the message is sent to the Arch Wireless computer server. Once in the server, a copy of the message is archived. The message is also stored in the server system, for a period of up to 72 hours, until the recipient pager is ready to receive delivery of the text message. The recipient pager is ready to receive delivery of a message when it is both activated and

> located in an Arch Wireless service area. Once the recipient pager is able to receive delivery of the text message, the Arch Wireless server retrieves the stored message and sends it, via wire or radio frequency transmission, to the transmitting station closest to the recipient pager. The transmitting stations are owed [sic] by Arch Wireless. The message is then sent from the transmitting station, via a radio frequency transmission, to the recipient pager where it can be read by the user of the recipient pager.

The City had no official policy directed to text-messaging by use of the pagers. However, the City did have a general "Computer Usage, Internet and E-mail Policy" (the "Policy") applicable to all employees. The Policy stated that "[t]he use of City-owned computers and all associated equipment, software, programs, networks, Internet, e-mail and other systems operating on these computers is limited to City of Ontario related business. The use of these tools for personal benefit is a significant violation of City of Ontario Policy." The Policy also provided:

> C. Access to all sites on the Internet is recorded and will be periodically reviewed by the City. The City of Ontario reserves the right to monitor and log all network activity including e-mail and Internet use, with or without notice. Users should have no expectation of privacy or confidentiality when using these resources.

> D. Access to the Internet and the e-mail system is **not** confidential; and information produced either in hard copy or in electronic form is considered City property. As such, these systems should not be used for personal or confidential communications. Deletion of e-mail or other electronic information may not fully delete the information from the system.
>
> E. The use of inappropriate, derogatory, obscene, suggestive, defamatory, or harassing language in the e-mail system will not be tolerated.

In 2000, before the City acquired the pagers, both Quon and Trujillo had signed an "Employee Acknowledgment," which borrowed language from the general Policy, indicating that they had "read and fully understand the City of Ontario's Computer Usage, Internet and E-mail policy." The Employee Acknowledgment, among other things, states that "[t]he City of Ontario reserves the right to monitor and log all network activity including e-mail and Internet use, with or without notice," and that "[u]sers should have no expectation of privacy or confidentiality when using these resources." Two years later, on April 18, 2002, Quon attended a meeting during which Lieutenant Steve Duke, a Commander with the Ontario Police Department's Administration Bureau, informed all present that the pager messages "were considered e-mail, and that those messages would fall under the City's policy as public information and eligible for auditing." Quon "vaguely recalled attending" this

meeting, but did not recall Lieutenant Duke stating at the meeting that use of the pagers was governed by the City's Policy.

Although the City had no official policy expressly governing use of the pagers, the City did have an informal policy governing their use. Under the City's contract with Arch Wireless, each pager was allotted 25,000 characters, after which the City was required to pay overage charges. Lieutenant Duke "was in charge of the purchasing contract" and responsible for procuring payment for overages. He stated that "[t]he practice was, if there was overage, that the employee would pay for the overage that the City had. . . . [W]e would usually call the employee and say, 'Hey, look, you're over X amount of characters. It comes out to X amount of dollars. Can you write me a check for your overage[?]' "

The informal policy governing use of the pagers came to light during the Internal Affairs investigation, which took place after Lieutenant Duke grew weary of his role as bill collector. In a July 2, 2003 memorandum entitled "Internal Affairs Investigation of Jeffery Quon," (the "McMahon Memorandum") OPD Sergeant Patrick McMahon wrote that upon interviewing Lieutenant Duke, he learned that early on

> Lieutenant Duke went to Sergeant Quon and told him the City issued two-way pagers were considered e-mail and could be audited. He told Sergeant Quon it was not his intent to audit employee's [sic] text messages to see

> if the overage is due to work related transmissions. He advised Sergeant Quon he could reimburse the City for the overage so he would not have to audit the transmission and see how many messages were non-work related. Lieutenant Duke told Sergeant Quon he is doing this because if anybody wished to challenge their overage, he could audit the text transmissions to verify how many were non-work related. Lieutenant Duke added the text messages were considered public records and could be audited at any time.

For the most part, Lieutenant Duke agreed with McMahon's characterization of what he said during his interview. Later, however, during his deposition, Lieutenant Duke recalled the interaction as follows:

> I think what I told Quon was that he had to pay for his overage, that I did not want to determine if the overage was personal or business unless they wanted me to, because if they said, "It's all business, I'm not paying for it," then I would do an audit to confirm that. And I didn't want to get into the bill collecting thing, so he needed to pay for his personal messages so we didn't – pay for the overage so we didn't do the audit. And he needed to cut down on his transmissions.

According to the McMahon Memorandum, Quon remembered the interaction differently. When asked "if he ever recalled a discussion with Lieutenant Duke that if his text-pager went over, his messages

would be audited . . . Sergeant Quon said, 'No. In fact he [Lieutenant Duke] said the other, if you don't want us to read it, pay the overage fee.'"

Quon went over the monthly character limit "three or four times" and paid the City for the overages. Each time, "Lieutenant Duke would come and tell [him] that[he] owed X amount of dollars because [he] went over [his] allotted characters." Each of those times, Quon paid the City for the overages.

In August 2002, Quon and another officer again exceeded the 25,000 character limit. Lieutenant Duke then let it be known at a meeting that he was "tired of being a bill collector with guys going over the allotted amount of characters on their text pagers." In response, Chief Scharf ordered Lieutenant Duke to "request the transcripts of those pagers for auditing purposes." Chief Scharf asked Lieutenant Duke "to determine if the messages were exclusively work related, thereby requiring an increase in the number of characters officers were permitted, which had occurred in the past, or if they were using the pagers for personal matters. One of the officers whose transcripts [he] requested was plaintiff Jeff Quon."

City officials were not able to access the text messages themselves. Instead, the City e-mailed Jackie Deavers, a major account support specialist for Arch Wireless, requesting the transcripts. According to Deavers,

> I checked the phone numbers on the transcripts against the e-mail that I had gotten,

> and I looked into the system to make sure they were actually pagers that belonged to the City of Ontario, and they were. So I took the transcripts and put them in a manila envelope [and brought them to the City].

Deavers stated that she did not determine whether private messages were being released, though she acknowledged that, upon reviewing approximately four lines of the transcript, she had realized that the messages were sexually explicit. She also stated that she would only deliver messages to the "contact" on the account, and that she would not deliver messages to the "user" unless he was also the contact on the account. In this case, the "contact" was the City.

After receiving the transcripts, Lieutenant Duke conducted an initial audit and reported the results to Chief Scharf. Subsequently, Chief Scharf and Quon's supervisor, Lieutenant Tony Del Rio, reviewed the transcripts themselves. Then, in October 2002, Chief Scharf referred the matter to internal affairs "to determine if someone was wasting . . . City time not doing work when they should be." Sergeant McMahon, who conducted this investigation on behalf of Internal Affairs, enlisted the help of Sergeant Glenn, also a member of Internal Affairs. Sergeant McMahon released the McMahon Memorandum on July 2, 2003. According to the Memorandum, the transcripts revealed that Quon "had exceeded his monthly allotted characters by 15,158 characters," and that many of these messages were personal in nature and were

often sexually explicit. These messages were directed to and received from, among others, the other Appellants.

II. PROCEDURAL BACKGROUND

On May 6, 2003, Appellants filed a Second Amended Complaint in the District Court for the Central District of California alleging, *inter alia,* violations of the Stored Communications Act ("SCA") and the Fourth Amendment. After the district court dismissed one of Appellants' claims against Arch Wireless pursuant to Federal Rule of Civil Procedure 12(b)(6), all parties filed numerous rounds of summary judgment motions. On August 15, 2006, the district court denied Appellants' summary judgment motion in full, and granted in part and denied in part Appellees' summary judgment motions.

Appellants appeal the district court's holding that Arch Wireless did not violate the SCA, 18 U.S.C. §§ 2701-2711.[2] The district court found that Arch Wireless was a "remote computing service" under § 2702(a), and that it therefore committed no harm when it released the text-message transcripts to its "subscriber," the City.

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[2] Appellants fail to raise on appeal their claims against Arch Wireless for violations of California Penal Code section 629.86 and their state-law invasion of privacy claim under Article I, Section 1 of the California Constitution. Therefore, they have waived those claims. *See Blanford v. Sacramento County*, 406 F.3d 1110, 1114 n. 8 (9th Cir.2005).

Appellants also appeal the district court's resolution of their claims against the City, the Department, Scharf, and Glenn.[3] Appellants argue that the City, the Department, and Scharf violated Appellants' Fourth Amendment rights to be free from unreasonable search and seizure pursuant to 42 U.S.C. § 1983, and that the City, Department, Scharf, and Glenn violated Article I, Section 1 of the California Constitution, which protects a citizen's right to privacy.[4] The district court addressed only the Fourth Amendment claim.[5] Relying on *O'Connor v. Ortega,* 480 U.S. 709, 715, 725-26, 107 S.Ct. 1492, 94 L.Ed.2d 714 (1987), the district court determined that to prove a Fourth Amendment violation, the plaintiff must show that he

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[3] Appellants fail to raise on appeal their claims against the City, the Department, Scharf, and Glenn for violations of the Stored Communications Act and California Penal Code section 629.86. Jerilyn Quon fails to address on appeal her claim for defamation and interference with prospective business advantage; nor does Florio address her claim that seizure of her personal pager and cell phone violated the Fourth Amendment. Therefore, Appellants have waived those claims. *See Blanford,* 406 F.3d at 1114.

[4] "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." CAL. CONST. art. I, § 1.

[5] The district court limited its discussion to the Fourth Amendment because "the arguments lodged by the governmental defendants against plaintiffs' invasion of privacy claim and state constitutional claim are the same as those pressed against plaintiffs' Fourth Amendment claim. . . ."

had a reasonable expectation of privacy in his text messages, and that the government's search or seizure was unreasonable under the circumstances. The district court held that, in light of Lieutenant Duke's informal policy that he would not audit a pager if the user paid the overage charges, Appellants had a reasonable expectation of privacy in their text messages as a matter of law. Regarding the reasonableness of the search, the district court found that whether Chief Scharf's intent was to uncover misconduct or to determine the efficacy of the 25,000 character limit was a genuine issue of material fact. If it was the former, the search was unreasonable; if it was the latter, the search was reasonable. Concluding that Chief Scharf was not entitled to qualified immunity on the Fourth Amendment claim, and that the City and the Department were not entitled to statutory immunity on the California constitutional privacy claim, the district court held a jury trial on the single issue of Chief Scharf's intent. The jury found that Chief Scharf's intent was to determine the efficacy of the character limit. Therefore, all defendants were absolved of liability for the search.

On December 7, 2006, Appellants filed a motion to amend or alter the judgment pursuant to Federal Rule of Civil Procedure 59(e), and a motion for new trial pursuant to Rule 59(a). The district court denied each of these motions. Appellants timely appeal.

III. JURISDICTION AND STANDARD OF REVIEW

The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343. We have jurisdiction over final judgments of the district courts pursuant to 28 U.S.C. § 1291.

We review a district court's grant of summary judgment de novo. *Bagdadi v. Nazar,* 84 F.3d 1194, 1197 (9th Cir.1996). In reviewing the grant of summary judgment, we "must determine, viewing the evidence in the light most favorable to the nonmoving party, whether genuine issues of material fact exist and whether the district court correctly applied the relevant substantive law." *Id.*

IV. DISCUSSION

A. Stored Communications Act

Congress passed the Stored Communications Act in 1986 as part of the Electronic Communications Privacy Act. The SCA was enacted because the advent of the Internet presented a host of potential privacy breaches that the Fourth Amendment does not address. *See* Orin S. Kerr, *A User's Guide to the Stored Communications Act, and a Legislator's Guide to Amending It,* 72 GEO. WASH. L. REV.. 1208, 1209-13 (2004). Generally, the SCA prevents "providers" of communication services from divulging private communications to certain entities and/or individuals. *Id.* at 1213. Appellants challenge the district court's finding that Arch Wireless is a "remote computing

service" ("RCS") as opposed to an "electronic communication service" ("ECS") under the SCA, §§ 2701-2711. The district court correctly concluded that if Arch Wireless is an ECS, it is liable as a matter of law, and that if it is an RCS, it is not liable. However, we disagree with the district court that Arch Wireless acted as an RCS for the City. Therefore, summary judgment in favor of Arch Wireless was error.

Section 2702 of the SCA governs liability for both ECS and RCS providers. 18 U.S.C. § 2702(a)(1)-(2). The nature of the services Arch Wireless offered to the City determines whether Arch Wireless is an ECS or an RCS. As the Niekamp Declaration makes clear, Arch Wireless provided to the City a service whereby it would facilitate communication between two pagers – "text messaging" over radio frequencies. As part of that service, Arch Wireless archived a copy of the message on its server. When Arch Wireless released to the City the transcripts of Appellants' messages, Arch Wireless potentially ran afoul of the SCA. This is because both an ECS and RCS can release private information to, or with the lawful consent of, "an addressee or intended recipient of such communication," *id.* § 2702(b)(1), (b)(3), whereas only an RCS can release such information "with the lawful consent of . . . the subscriber." *Id.* § 2702(b)(3). It is undisputed that the City was not an "addressee or intended recipient," and that the City was a "subscriber."

The SCA defines an ECS as "any service which provides to users thereof the ability to send or receive

wire or electronic communications." *Id.* § 2510(15). The SCA prohibits an ECS from "knowingly divulg[ing] to any person or entity the contents of a communication while in electronic storage by that service," unless, among other exceptions not relevant to this appeal, that person or entity is "an addressee or intended recipient of such communication." *Id.* § 2702(a)(1), (b)(1), (b)(3). "Electronic storage" is defined as "(A) any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof; and (B) any storage of such communication by an electronic communication service for purposes of backup protection of such communication." *Id.* § 2510(17).

An RCS is defined as "the provision to the public of computer storage or processing services by means of an electronic communications system." *Id.* § 2711(2). Electronic communication system – which is simply the means by which an RCS provides computer storage or processing services and has no bearing on how we interpret the meaning of "RCS" – is defined as "any wire, radio, electromagnetic, photooptical or photoelectronic facilities for the transmission of wire or electronic communications, and any computer facilities or related electronic equipment for the electronic storage of such communications." *Id.* § 2510(14). The SCA prohibits an RCS from "knowingly divulg[ing] to any person or entity the contents of any communication which is carried or maintained on that service." Unlike an ECS, an RCS may release the contents of a communication with the

lawful consent of a "subscriber." *Id.* § 2702(a)(2), (b)(3).

We turn to the plain language of the SCA, including its common-sense definitions, to properly categorize Arch Wireless. An ECS is defined as "any service which provides to users thereof the ability to send or receive wire or electronic communications." 18 U.S.C. § 2510(15). On its face, this describes the text-messaging pager services that Arch Wireless provided. Arch Wireless provided a "service" that enabled Quon and the other Appellants to "send or receive . . . electronic communications," i.e., text messages. Contrast that definition with that for an RCS, which "means the provision to the public of computer storage or processing services by means of an electronic communications system." *Id.* § 2711(2). Arch Wireless did not provide to the City "computer storage"; nor did it provide "processing services." By archiving the text messages on its server, Arch Wireless certainly was "storing" the messages. However, Congress contemplated this exact function could be performed by an ECS as well, stating that an ECS would provide (A) temporary storage incidental to the communication; and (B) storage for backup protection. *Id.* § 2510(17).

This reading of the SCA is supported by its legislative history. The Senate Report identifies two main services that providers performed in 1986:(1) data communication; and (2) data storage and processing. First, the report describes the means of communication of information:

> [W]e have large-scale electronic mail operations, computer-to-computer data transmissions, cellular and cordless telephones, paging devices, and video teleconferencing. . . . [M]any different companies, not just common carriers, offer a wide variety of telephone and other communications services.

S. REP. NO. 99-541, at 2-3 (1986). Second,

> [t]he Committee also recognizes that computers are used extensively today for the storage and processing of information. With the advent of computerized recordkeeping systems, Americans have lost the ability to lock away a great deal of personal and business information. For example, physicians and hospitals maintain medical files in offsite data banks, businesses of all sizes transmit their records to remote computers to obtain sophisticated data processing services. These services as well as the providers of electronic mail create electronic copies of private correspondence for later reference. This information is processed for the benefit of the user but often it is maintained for approximately 3 months to ensure system integrity.

Id. at 3. Under the heading "Remote Computer Services," the Report further clarifies that term refers to the processing or storage of data by an off-site third party:

> In the age of rapid computerization, a basic choice has faced the users of computer

> technology. That is, whether to process data inhouse on the user's own computer or on someone else's equipment. Over the years, remote computer service companies have developed to provide sophisticated and convenient computing services to subscribers and customers from remote facilities. Today businesses of all sizes – hospitals, banks and many others – use remote computing services for computer processing. This processing can be done with the customer or subscriber using the facilities of the remote computing service in essentially a time-sharing arrangement, or it can be accomplished by the service provider on the basis of information supplied by the subscriber or customer. Data is most often transmitted between these services and their customers by means of electronic communications.

Id. at 10-11.

In the Senate Report, Congress made clear what it meant by "storage and processing of information." It provided the following example of storage: "physicians and hospitals maintain medical files in offsite data banks." Congress appeared to view "storage" as a virtual filing cabinet, which is not the function Arch Wireless contracted to provide here. The Senate Report also provided an example of "processing of information": "businesses of all sizes transmit their records to remote computers to obtain sophisticated data processing services." In light of the Report's elaboration upon what Congress intended by the term

"Remote Computer Services," it is clear that, before the advent of advanced computer processing programs such as Microsoft Excel, businesses had to farm out sophisticated processing to a service that would process the information. *See* Kerr, 72 GEO. WASH. L. REV. at 1213-14. Neither of these examples describes the service that Arch Wireless provided to the City.

Any lingering doubt that Arch Wireless is an ECS that retained messages in electronic storage is disposed of by *Theofel v. Farey-Jones,* 359 F.3d 1066, 1070 (9th Cir.2004). In *Theofel,* we held that a provider of e-mail services, undisputedly an ECS, stored e-mails on its servers for backup protection. *Id.* at 1075.NetGate was the plaintiffs' Internet Service Provider ("ISP"). Pursuant to a subpoena, NetGate turned over plaintiffs' e-mail messages to the defendants. We concluded that plaintiffs' e-mail messages – which were stored on NetGate's server after delivery to the recipient – were "stored 'for purposes of backup protection' . . . . within the ordinary meaning of those terms." *Id.* (citation omitted).

The service provided by NetGate is closely analogous to Arch Wireless's storage of Appellants' messages. Much like Arch Wireless, NetGate served as a conduit for the transmission of electronic communications from one user to another, and stored those communications "as a 'backup' for the user." *Id.* Although it is not clear for whom Arch Wireless "archived" the text messages – presumably for the user or Arch Wireless itself – it is clear that the

messages were archived for "backup protection," just as they were in *Theofel*. Accordingly, Arch Wireless is more appropriately categorized as an ECS than an RCS.

Arch Wireless contends that our analysis in *Theofel* of the definition of "backup protection" supports its position. There, we noted that "[w]here the underlying message has expired in the normal course, any copy is no longer performing any backup function. An ISP that kept permanent copies of temporary messages could not fairly be described as 'backing up' those messages." *Id.* at 1070. Thus, the argument goes, Arch Wireless's permanent retention of the Appellants' text messages could not have been for backup purposes; instead, it must have been for storage purposes, which would require us to classify Arch Wireless as an RCS. This reading is not persuasive. First, there is no indication in the record that Arch Wireless retained a permanent copy of the text-messages or stored them for the benefit of the City; instead, the Niekamp Declaration simply states that copies of the messages are "archived" on Arch Wireless's server. More importantly, *Theofel*'s holding – that the e-mail messages stored on NetGate's server after delivery were for "backup protection," and that NetGate was undisputedly an ECS – forecloses Arch Wireless's position.

We hold that Arch Wireless provided an "electronic communication service" to the City. The parties do not dispute that Arch Wireless acted "knowingly" when it released the transcripts to the City. When

Arch Wireless knowingly turned over the text-messaging transcripts to the City, which was a "subscriber," not "an addressee or intended recipient of such communication," it violated the SCA, 18 U.S.C. § 2702(a)(1). Accordingly, judgment in Appellants' favor on their claims against Arch Wireless is appropriate as a matter of law, and we remand to the district court for proceedings consistent with this holding.

B. Fourth Amendment

Appellants assert that they are entitled to summary judgment on their Fourth Amendment claim against the City, the Department, and Scharf, and on their California constitutional privacy claim against the City, the Department, Scharf, and Glenn. Specifically, Appellants agree with the district court's conclusion that they had a reasonable expectation of privacy in the text messages. However, they argue that the issue regarding Chief Scharf's intent in authorizing the search never should have gone to trial because the search was unreasonable as a matter of law. We agree.

"The 'privacy' protected by[Article I, Section 1 of the California Constitution] is no broader in the area of search and seizure than the 'privacy' protected by the Fourth Amendment. . . ." *Hill v. Nat'l Collegiate Ath. Ass'n,* 7 Cal.4th 1, 30 n. 9, 26 Cal.Rptr.2d 834, 865 P.2d 633 (1994). Accordingly, our analysis proceeds under the Fourth Amendment to the United

States Constitution. The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. CONST. amend. IV. "[T]he touchstone of the Fourth Amendment is reasonableness." *United States v. Kriesel,* 508 F.3d 941, 947 (9th Cir.2007) (citing *Samson v. California,* 547 U.S. 843, 126 S.Ct. 2193, 2201 n. 4, 165 L.Ed.2d 250 (2006)). Under the "general Fourth Amendment approach," we examine "the totality of the circumstances to determine whether a search is reasonable." *Id.* "The reasonableness of a search is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *United States v. Knights,* 534 U.S. 112, 118-19, 122 S.Ct. 587, 151 L.Ed.2d 497 (2001) (internal quotation marks omitted).

"Searches and seizures by government employers or supervisors of the private property of their employees . . . are subject to the restraints of the Fourth Amendment." *O'Connor,* 480 U.S. at 715, 107 S.Ct. 1492. In *O'Connor,* the Supreme Court reasoned that "[i]ndividuals do not lose Fourth Amendment rights merely because they work for the government instead of a private employer." *Id.* at 717, 107 S.Ct. 1492. However, the Court also noted that "[t]he operational realities of the workplace . . . may make *some* employees' expectations of privacy unreasonable." *Id.* For example, "[p]ublic employees' expectations of

privacy in their offices, desks, and file cabinets . . . may be reduced by virtue of actual office practices and procedures, or by legitimate regulation." *Id.* The Court recognized that, "[g]iven the great variety of work environments in the public sector, the question whether an employee has a reasonable expectation of privacy must be addressed on a case-by-case basis." *Id.* at 718, 107 S.Ct. 1492.

Even assuming an employee has a reasonable expectation of privacy in the item seized or the area searched, he must also demonstrate that the search was unreasonable to prove a Fourth Amendment violation: "public employer intrusions on the constitutionally protected privacy interests of government employees for noninvestigatory, work-related purposes, as well as for investigations of work-related misconduct, should be judged by the standard of reasonableness under all the circumstances." *Id.* at 725-26, 107 S.Ct. 1492. Under this standard, we must evaluate whether the search was "justified at its inception," and whether it "was reasonably related in scope to the circumstances which justified the interference in the first place." *Id.* at 726, 107 S.Ct. 1492 (internal quotation marks omitted).

1. Reasonable Expectation of Privacy

The extent to which the Fourth Amendment provides protection for the contents of electronic communications in the Internet age is an open question. The recently minted standard of electronic

communication via e-mails, text messages, and other means opens a new frontier in Fourth Amendment jurisprudence that has been little explored. Here, we must first answer the threshold question: Do users of text messaging services such as those provided by Arch Wireless have a reasonable expectation of privacy in their text messages stored on the service provider's network? We hold that they do.

In *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), the government placed an electronic listening device on a public telephone booth, which allowed the government to listen to the telephone user's conversation. *Id.* at 348, 88 S.Ct. 507. The Supreme Court held that listening to the conversation through the electronic device violated the user's reasonable expectation of privacy. *Id.* at 353, 88 S.Ct. 507. In so holding, the Court reasoned, "One who occupies [a phone booth], shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world. To read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication." *Id.* at 352, 88 S.Ct. 507. Therefore, "[t]he Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment." *Id.* at 353, 88 S.Ct. 507.

On the other hand, the Court has also held that the government's use of a pen register – a device that records the phone numbers one dials – does not violate the Fourth Amendment. This is because people "realize that they must 'convey' phone numbers to the telephone company, since it is through telephone company switching equipment that their calls are completed." *Smith v. Maryland,* 442 U.S. 735, 742, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979). The Court distinguished *Katz* by noting that "a pen register differs significantly from the listening device employed in *Katz,* for pen registers do not acquire the *contents* of communications." *Id.* at 741, 99 S.Ct. 2577.

This distinction also applies to written communications, such as letters. It is well-settled that, "since 1878, . . . the Fourth Amendment's protection against 'unreasonable searches and seizures' protects a citizen against the warrantless opening of sealed letters and packages addressed to him in order to examine the contents." *United States v. Choate,* 576 F.2d 165, 174 (9th Cir.1978) (citing *Ex parte Jackson,* 96 U.S. 727, 24 L.Ed. 877 (1877)); *see also United States v. Jacobsen,* 466 U.S. 109, 114, 104 S.Ct. 1652, 80 L.Ed.2d 85 (1984) ("Letters and other sealed packages are in the general class of effects in which the public at large has a legitimate expectation of privacy."). However, as with the phone numbers they dial, individuals do not enjoy a reasonable expectation of privacy in what they write on the outside of an envelope. *See United States v. Hernandez,* 313 F.3d

1206, 1209-10 (9th Cir.2002) ("Although a person has a legitimate interest that a mailed package will not be opened and searched en route, there can be no reasonable expectation that postal service employees will not handle the package or that they will not view its exterior" (citations omitted)).

Our Internet jurisprudence is instructive. In *United States v. Forrester,* we held that "e-mail . . . users have no expectation of privacy in the to/from addresses of their messages . . . because they should know that this information is provided to and used by Internet service providers for the specific purpose of directing the routing of information." *United States v. Forrester,* 512 F.3d 500, 510 (9th Cir.2008). Thus, we have extended the pen register and outside-of-envelope rationales to the "to/from" line of e-mails. But we have not ruled on whether persons have a reasonable expectation of privacy in the content of e-mails. Like the Supreme Court in *Smith,* in *Forrester* we explicitly noted that "e-mail to/from addresses . . . constitute addressing information and do not necessarily reveal any more about the underlying contents of communication than do phone numbers." *Id.* Thus, we concluded that "[t]he privacy interests in these two forms of communication [letters and e-mails] are identical," and that, while "[t]he contents may deserve Fourth Amendment protection . . . the address and size of the package do not." *Id.* at 511.

We see no meaningful difference between the e-mails at issue in *Forrester* and the text messages at issue here.[6] Both are sent from user to user via a service provider that stores the messages on its servers. Similarly, as in *Forrester,* we also see no meaningful distinction between text messages and letters. As with letters and e-mails, it is not reasonable to expect privacy in the information used to "address" a text message, such as the dialing of a phone number to send a message. However, users do have a reasonable expectation of privacy in the content of their text messages vis-a-vis the service provider. *Cf. United States v. Finley,* 477 F.3d 250, 259 (5th Cir.2007) (holding that defendant had a reasonable expectation of privacy in the text messages on his cell phone, and that he consequently had standing to challenge the search). That Arch Wireless may have been able to access the contents of the messages for its own purposes is irrelevant. *See United States v. Heckenkamp,* 482 F.3d 1142, 1146-47 (9th Cir.2007) (holding that a student did not lose his reasonable expectation of privacy in information stored on his computer, despite a university policy that it could access his computer in limited circumstances while connected to the university's network); *United States v. Ziegler,* 474 F.3d 1184, 1189-90 (9th Cir.2007)

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[6] Because Jeff Quon's reasonable expectation of privacy hinges on the OPD's informal policy regarding his use of the OPD-issued pagers, *see infra* pages 909-10, this conclusion affects only the rights of Trujillo, Florio, and Jerilyn Quon.

(holding that an employee had a reasonable expectation of privacy in a computer in a locked office despite a company policy that computer usage would be monitored). For, just as in *Heckenkamp,* where we found persuasive that there was "no policy allowing the university actively to monitor or audit [the student's] computer usage," 482 F.3d at 1147, Appellants did not expect that Arch Wireless would monitor their text messages, much less turn over the messages to third parties without Appellants' consent.

We do not endorse a monolithic view of text message users' reasonable expectation of privacy, as this is necessarily a context-sensitive inquiry. Absent an agreement to the contrary, Trujillo, Florio, and Jerilyn Quon had no reasonable expectation that Jeff Quon would maintain the private nature of their text messages, or vice versa. *See United States v. Maxwell,* 45 M.J. 406, 418 (C.A.A.F.1996) ("[T]he maker of a telephone call has a reasonable expectation that police officials will not intercept and listen to the conversation; however, the conversation itself is held with the risk that one of the participants may reveal what is said to others." (citing *Hoffa v. United States,* 385 U.S. 293, 302, 87 S.Ct. 408, 17 L.Ed.2d 374 (1966))). Had Jeff Quon voluntarily permitted the Department to review his text messages, the remaining Appellants would have no claims. Nevertheless, the OPD surreptitiously reviewed messages that all parties reasonably believed were free from third-party review. As a matter of law, Trujillo, Florio, and Jerilyn Quon had a reasonable expectation that the

Department would not review their messages absent consent from either a sender or recipient of the text messages.

We now turn to Jeff Quon's reasonable expectation of privacy, which turns on the Department's policies regarding privacy in his text messages. We agree with the district court that the Department's informal policy that the text messages would not be audited if he paid the overages rendered Quon's expectation of privacy in those messages reasonable.

The Department's general "Computer Usage, Internet and E-mail Policy" stated both that the use of computers "for personal benefit is a significant violation of City of Ontario Policy" and that "[u]sers should have no expectation of privacy or confidentiality when using these resources." Quon signed this Policy and attended a meeting in which it was made clear that the Policy also applied to use of the pagers. If that were all, this case would be analogous to the cases relied upon by the Appellees. *See, e.g., Muick v. Glenayre Elecs.*, 280 F.3d 741, 743 (7th Cir.2002) ("[Employer] had announced that it could inspect the laptops that it furnished for the use of its employees, and this destroyed any reasonable expectation of privacy that [employee] might have had and so scotches his claim."); *Bohach v. City of Reno*, 932 F.Supp. 1232, 1234-35 (D.Nev.1996) (finding a diminished expectation of privacy under the Fourth Amendment where police department had issued a memorandum informing employees that messages sent on city-issued pagers would be "logged on the

[department's] network" and that certain types of messages were "banned from the system," and because any employee "with access to, and a working knowledge of, the Department's computer system" could see the messages); *see also O'Connor,* 480 U.S. at 719, 107 S.Ct. 1492 (noting that expectation of privacy would not be reasonable if the employer "had established any reasonable regulation or policy discouraging employees . . . from storing personal papers and effects in their desks or file cabinets"); *Schowengerdt v. General Dynamics Corp.,* 823 F.2d 1328, 1335 (9th Cir.1987) ("We conclude that [the employee] would enjoy a reasonable expectation of privacy in areas given over to his exclusive use, unless he was on notice from his employer that searches of the type to which he was subjected might occur from time to time for work-related purposes.").

As the district court made clear, however, such was not the "operational reality" at the Department. The district court reasoned:

> Lieutenant Duke made it clear to the staff, and to Quon in particular, that he would *not* audit their pagers so long as they agreed to pay for any overages. Given that Lieutenant Duke was the one in charge of administering the use of the city-owned pagers, his statements carry a great deal of weight. Indeed, before the events that transpired in this case the department did not audit any employee's use of the pager for the eight months the pagers had been in use.

Even more telling, Quon had exceeded the 25,000 character limit "three or four times," and had paid for the overages every time without anyone reviewing the text of the messages. This demonstrated that the OPD followed its "informal policy" and that Quon reasonably relied on it. Nevertheless, without warning, his text messages were audited by the Department. Under these circumstances, Quon had a reasonable expectation of privacy in the text messages archived on Arch Wireless's server.

Appellees argue that, because Lieutenant Duke was not a policymaker, his informal policy could not create an objectively reasonable expectation of privacy. Moreover, Lieutenant Duke's statements "were specific to his own bill-collecting practices" and were "limited to . . . an accounting audit. He did not address privacy rights." However, as the district court pointed out, "Lieutenant Duke was the one in charge of administering the use of the city-owned pagers, [and] his statements carry a great deal of weight." That Lieutenant Duke was not the official policymaker, or even the final policymaker, does not diminish the chain of command. He was in charge of the pagers, and it was reasonable for Quon to rely on the policy – formal or informal – that Lieutenant Duke established and enforced.

Appellees also point to the California Public Records Act ("CPRA") to argue that Quon had no reasonable expectation of privacy because, under that Act, "public records are open to inspection at all times . . . and every person has a right to inspect any public

record." CAL GOV'T CODE § 6253. Assuming for purposes of this appeal that the text messages archived on Arch Wireless's server were public records as defined by the CPRA,[7] we are not persuaded by Appellees' argument. The CPRA does not diminish an employee's reasonable expectation of privacy. As the district court reasoned, "There is no evidence before the [c]ourt suggesting that CPRA requests to the department are so widespread or frequent as to constitute 'an open atmosphere so open to fellow employees or the public that no expectation of privacy is reasonable.'" (quoting *Leventhal v. Knapek,* 266 F.3d 64, 74 (2d Cir.2001) (internal quotation marks omitted)).

The Fourth Amendment utilizes a reasonableness standard. Although the fact that a hypothetical member of the public may request Quon's text messages might slightly diminish his expectation of privacy in the messages, it does not make his belief in the privacy of the text messages objectively unreasonable. *See Zaffuto v. City of Hammond,* 308 F.3d 485, 489 (5th Cir.2002) ("[Defendant] also argues that the existence of Louisiana's public records law and a department policy that calls would be taped suggests that it would not be objectively reasonable

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[7] The Act defines "public records" as "any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." CAL GOV'T CODE § 6252(e).

for [plaintiff] to expect privacy in making a personal phone call from work. . . . [The officers testified that] they understood the policy to mean that only calls coming into the communications room (where outside citizens would call) were being recorded, not calls from private offices. A reasonable juror could conclude, on this evidence, that [plaintiff] expected that his call to his wife would be private, and that that expectation was objectively reasonable."). Therefore, Appellees' CPRA argument is without merit.

2. Reasonableness of the Search

Given that Appellants had a reasonable expectation of privacy in their text messages, we now consider whether the search was reasonable. We hold that it was not.

The district court found a material dispute concerning the "actual *purpose* or *objective* Chief Scharf sought to achieve in having Lieutenant Duke perform the audit of Quon's pager." It reasoned that if Chief Scharf's purpose was to uncover misconduct, the search was unreasonable at its inception because "the officers' pagers were audited for the period when Lieutenant Duke's informal, but express policy of *not* auditing pagers unless overages went unpaid was in effect." The district court further reasoned, however, that if the purpose was to determine "the utility or efficacy of the existing monthly character limits," the search was reasonable because "the audit was done for the benefit of (not as a punishment against) the

officers who had gone over the monthly character limits." Concluding that a genuine issue of material fact existed on this point, the district judge determined that this was a question for the jury. The jury found that Chief Scharf's purpose was to "determine the efficacy of the existing character limits to ensure that officers were not being required to pay for work-related expenses," rendering a verdict in favor of the City, the Department, Scharf, and Glenn.

Given that a jury has already found that Chief Scharf's purpose in auditing the text messages was to determine the efficacy of the 25,000 character limit, we must determine – keeping that purpose in mind – whether the search was nevertheless unconstitutional.

A search is reasonable "at its inception" if there are "reasonable grounds for suspecting . . . that the search is necessary for a noninvestigatory work-related purpose such as to retrieve a needed file." *O'Connor,* 480 U.S. at 726, 107 S.Ct. 1492. Here, the purpose was to ensure that officers were not being required to pay for work-related expenses. This is a legitimate work-related rationale, as the district court acknowledged.

However, the search was not reasonable in scope. As *O'Connor* makes clear, a search is reasonable in scope "when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of . . . the nature of the [misconduct]." *Id.* (internal quotation marks omitted).

Thus, "if less intrusive methods were feasible, or if the depth of the inquiry or extent of the seizure exceeded that necessary for the government's legitimate purposes . . . the search would be unreasonable. . . ." *Schowengerdt,* 823 F.2d at 1336. The district court determined that there were no less-intrusive means, reasoning that talking to the officers beforehand or looking only at the numbers dialed would not have allowed Chief Scharf to determine whether 25,000 characters were sufficient for work-related text messaging because that required examining the content of all the messages. Therefore, "the only way to accurately and definitively determine whether such hidden costs were being imposed by the monthly character limits that were in place was by looking at the actual text-messages used by the officers who exceeded the character limits."

We disagree. There were a host of simple ways to verify the efficacy of the 25,000 character limit (if that, indeed, was the intended purpose) without intruding on Appellants' Fourth Amendment rights. For example, the Department could have warned Quon that for the month of September he was forbidden from using his pager for personal communications, and that the contents of all of his messages would be reviewed to ensure the pager was used only for work-related purposes during that time frame. Alternatively, if the Department wanted to review past usage, it could have asked Quon to count the characters himself, or asked him to redact personal messages and grant permission to the Department to

review the redacted transcript. Under this process, Quon would have an incentive to be truthful because he may have previously paid for work-related overages and presumably would want the limit increased to avoid paying for such overages in the future. These are just a few of the ways in which the Department could have conducted a search that was reasonable in scope. Instead, the Department opted to review the contents of all the messages, work-related and personal, without the consent of Quon or the remaining Appellants. This was excessively intrusive in light of the noninvestigatory object of the search, and because Appellants had a reasonable expectation of privacy in those messages, the search violated their Fourth Amendment rights.

3. Qualified Immunity for Chief Scharf

Chief Scharf asserts that, even if we conclude that he violated Appellants' Fourth Amendment and California constitutional privacy rights, he is entitled to qualified immunity. We agree.

When determining whether qualified immunity applies, we engage in the following two-step inquiry. First, we ask, "[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Saucier v. Katz,* 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). If we answer this question in the affirmative, as we do here, we then proceed to determine "whether the right was clearly

established." *Id.* "This inquiry . . . must be undertaken in light of the specific context of the case, not as a broad general proposition." *Id.* Specifically, "[t]he relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 202, 121 S.Ct. 2151.

Chief Scharf argues that, "[i]n 2002, there was no clearly established law from the Supreme Court or our Circuit governing the right of a government employer to review text messages on government-issued pagers in order to determine whether employees are engaging in excessive personal use of the pagers while on duty." Chief Scharf misconstrues *Saucier.* While there may be no case with a holding that aligns perfectly with the factual scenario presented here, it was clear at the time of the search that an employee is free from unreasonable search and seizure in the workplace. *See, e.g., O'Connor,* 480 U.S. at 715, 107 S.Ct. 1492 (1987); *Schowengerdt,* 823 F.2d at 1335 (1987); *Ortega v. O'Connor,* 146 F.3d 1149, 1157 (9th Cir.1998) ("[I]t was clearly established in 1981 that, in the absence of an accepted practice or regulation to the contrary, government employees . . . had a reasonable expectation of privacy in their private offices, desks, and file cabinets, thereby triggering the protections of the Fourth Amendment with regard to searches and seizures.").

Nevertheless, we ultimately agree with Chief Scharf because, at the time of the search, there was

no clearly established law regarding whether users of text-messages that are archived, however temporarily, by the service provider have a reasonable expectation of privacy in those messages. Therefore, Chief Scharf is entitled to qualified immunity.

4. Statutory Immunity on the California Constitutional Claim

The City and the Department contend that they are shielded from liability on the California constitutional claim. We conclude that the district court correctly determined that the City and the Department are not protected by statutory immunity.

California Government Code section 821.6 provides that "[a] public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause." "The policy behind section 821.6 is to encourage fearless performance of official duties. State officers and employees are encouraged to investigate and prosecute matters within their purview without fear of reprisal from the person or entity harmed thereby." *Shoemaker v. Myers,* 2 Cal.App.4th 1407, 1424, 4 Cal.Rptr.2d 203 (1992) (citations omitted). Immunity "also extends to actions taken in preparation for formal proceedings. Because investigation is an essential step toward the institution of formal proceedings, it is also cloaked with immunity." *Amylou R. v. County of Riverside,* 28 Cal.App.4th

1205, 1209-10, 34 Cal.Rptr.2d 319 (1994) (internal quotation marks omitted).

Although Chief Scharf ordered an "investigation" in the ordinary sense of the word, the investigation never could have led to a "judicial or administrative proceeding" because Lieutenant Duke's informal policy permitted officers to use the pagers for personal purposes and to exceed the 25,000 character limit. Thus, Quon could have committed no misconduct, a prerequisite for a formal proceeding against him. As such, the City's and Department's conduct does not fall within California Government Code section 821.6, and they are not entitled to statutory immunity.

V. CONCLUSION

As a matter of law, Arch Wireless is an "electronic communication service" that provided text messaging service via pagers to the Ontario Police Department. The search of Appellants' text messages violated their Fourth Amendment and California constitutional privacy rights because they had a reasonable expectation of privacy in the content of the text messages, and the search was unreasonable in scope. While Chief Scharf is shielded by qualified immunity, the City and the Department are not shielded by statutory immunity. In light of our conclusions of law, we affirm in part, reverse in part, and remand to the district court for further proceedings on Appellants' Stored Communications Act claim against Arch Wireless, and their claims against the City, the

Department, and Glenn under the Fourth Amendment and California Constitution.

Because we hold that Appellants prevail as a matter of law on their claims against Arch Wireless, the City, the Department, and Glenn, we need not reach their appeal from the denial of their motions to alter or amend the judgment and for a new trial under Federal Rule of Civil Procedure 59. The parties shall bear their own costs of appeal.

AFFIRMED in part, REVERSED in part, and REMANDED for Further Proceedings.

445 F.Supp.2d 1116

United States District Court, C.D. California. Jeff QUON, Jerilyn Quon, April Florio, Doreen Klein, and Steve Trujillo, Plaintiffs, v. ARCH WIRELESS OPERATING COMPANY, INC.; City of Ontario; Ontario Police Department; Lloyd Scharf, and Debbie Glenn, Defendants. No. EDCV 03-199 SGL.

Aug. 15, 2006.

AMENDED ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT, AND DENYING PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT[1]

LARSON, District Judge.

What are the legal boundaries of an employee's privacy in this interconnected, electronic-communication age, one in which thoughts and ideas that would have been spoken personally and privately in ages past are now instantly text-messaged to friends and family *via* hand-held, computer-assisted electronic devices? It is precisely this question that is before the Court in the form of plaintiffs' motions for summary judgment and defendants' cross-motions for summary judgment. After reviewing the pleadings and listening to the parties' oral arguments at multiple hearings on the

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[1] The Court vacates the order of March 9, 2006, concerning some of the parties' motions for summary judgment. Since that time, the parties have filed a second round of summary judgment motions. This amended order addresses all of the parties' summary judgment motions.

instant motions, the Court, for the reasons set forth below, **GRANTS IN PART** and **DENIES IN PART** defendants' motions for summary judgment and **DENIES** plaintiffs' motions for summary judgment.

Given that the applicable legal standard for considering such motions has long past become firmly established, the Court will only briefly remind the reader: Summary judgment can be granted only where there is no genuine issue as to any material fact and where the movant is entitled to judgment as a matter of law; in determining whether these conditions are met the record must be viewed in the light most favorable to the party opposing the motion, with the court indulging in all inferences favorable to that party. *See* Fed.R.Civ.P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255-56, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Brookside Assocs. v. Rifkin*, 49 F.3d 490, 492-93 (9th Cir.1995).

This case has its genesis in gross malfeasance which, no one disputes, took place in the Ontario Police Department's dispatch center in the early part of this decade. Sally Bors, a dispatcher, was under investigation in September, 2002, for providing information to her boyfriend Mark Timbrell, who was a member of the Hell's Angels motorcycle gang, regarding police investigative activity about the Hell's Angels in general and Timbrell in particular. A sting operation was performed to ferret out this corruption on September 16, 2002. A narcotics officer called in the license plate of a known Hell's Angels member to

Bors. Rather than contacting the Hell's Angels member directly, Bors used her pager to text message another dispatcher, Angela Santos, requesting that she contact the Hell's Angels member and let him know he was being followed by a narcotics agent. After doing so, Santos immediately contacted yet another dispatcher, April Florio, and informed her of what she had done for Bors. Florio then contacted fellow dispatcher Doreen Klein about Bors/Santos' activities. Neither Florio nor Klein reported this malfeasance to any personnel, supervisory or otherwise, in the police department.

When Klein and Florio arrived at the dispatch center the following day, they were asked to report to their supervisor's office to answer some questions. When they arrived in the supervisor's office, internal affairs Sergeant Deborah Glenn asked them to hand over their personal cell phones and pagers before the questioning would commence. Two weeks earlier the department had issued a memorandum to those working in the dispatch center that, "[e]ffective immediately and until further notice, use of all cell phones and pagers within the Dispatch Center will be prohibited. On duty personnel shall leave pagers and cell phones in their lockers and check them on their breaks." (Joint Defs. Exhibits in Support Mot. Summ. J., Ex. EE). The pagers and cell phones were kept on a table in an interrogation room where Florio and Klein were separately interviewed by internal affairs personnel. The reason proffered for the seizure of the duo's personal pagers and cell phones was to "preclude

[them] . . . from covertly communicating with one another before, during, or after each of their interviews" so they could not coordinate their stories. (Defs' Mot. Summ. J. at 43; Pls' Index of Exhibits in Opp., Ex. G at 44). The pagers and cell phones were apparently returned to Klein and Florio following the interrogation. Florio and Klein alleged that during the interrogation, Sergeant Glenn examined and read information contained on their cell phones and pagers, including text messages, names, phone numbers, and street addresses. (Second Am. Compl. P 72). This allegation in the complaint, however, was never confirmed during the subsequent discovery conducted in this case.

Klein, Florio, and Santos were each interviewed in turn by internal affairs personnel. During their interviews, Klein and Florio "played dumb" with respect to the malfeasance in the dispatch center. When Santos was interviewed, however, she confessed to her involvement, informing internal affairs personnel that, at the behest of Bors, she had contacted a Hell's Angels member and advised him that he was being followed by police, and that she also relayed that information to Florio.

On the next day, September 18, 2002, Florio and Klein were re-interviewed by internal affairs personnel. Only when confronted with Santos' confession did each in turn acknowledge that they too were aware that Santos had contacted a Hell's Angels member to inform him that he was being followed by the police.

Klein and Florio were later terminated from their positions on account of their misconduct.

In the midst of these developments, a separate event took place that would later become embroiled in the dispatch center investigation. The event involved the department's audit of the text messages sent to and sent from police sergeant Jeff Quon's city-issued pager for the period of August 1 to September 30, 2002. The connection between the Quon pager audit and the Bors investigation arises in part from the fact that, at the time, Jeff Quon, who was married to Jerilyn Quon, another Ontario police officer, was having an extra-martial [sic] affair with Florio. Some prefatory remarks at this point concerning the city-issued pagers is warranted.

In October, 2001, the City of Ontario entered into a contract with Arch Wireless Operating Company, Inc. ("Arch Wireless"), subscribing for the provision of two-way alphanumeric text-messaging pagers for its employees as well as other wireless communication services incident to the use of such pagers. As part of the contract, the City paid Arch Wireless a monthly subscription rate keyed to each pager being allotted 25,000 characters – be it letters, numbers, or other symbols – per month, with the City having to pay extra for any overages. The City issued such a pager to members of the police department's SWAT team, which included plaintiffs Jeff Quon and Steve Trujillo, both of whom were sergeants with the City's SWAT team. The issuance of such city-owned pagers to members of the SWAT team was meant to enable

better coordination and a more rapid and effective response to emergencies by providing nearly instantaneous situational awareness to the team as to the other members whereabouts.

Text messages sent on the pagers operate as follows over the Arch Wireless network:

> The message leaves the originating pager via a radio frequency transmission. That transmission is received by any one of many receiving stations, which are owned by Arch Wireless. Depending on the location of the receiving station, the message is then entered into the Arch Wireless computer network either by wire transmission or via satellite by another radio frequency transmission. Once in the Arch Wireless computer network, the message is sent to the Arch Wireless computer server. Once in the server, a copy of the message is archived. The message is also stored in the server system, for a period of up to 72 hours, until the recipient pager is ready to receive delivery of the text message. The recipient pager is ready to receive delivery of a message when it is both activated and located in an Arch Wireless service area. Once the recipient pager is able to receive delivery of the text message, the Arch Wireless server retrieves the stored message and sends it, via wire or radio frequency transmission, to the transmitting station closest to the recipient pager. The transmitting stations are owned by Arch

> Wireless. The message is then sent from the transmitting station via a radio frequency transmission, to the recipient pager where it can be read by the user of the recipient pager.

(Decl. Steven Niehamp ¶¶ 3-7).

As part of its provision of *computer* desktop equipment to its personnel, the Ontario police department had all of its employees review and sign a written statement of the department's policy concerning use of this equipment. The statement, entitled "Computer Usage, Internet and E-mail Policy," states that the department's policy encompasses "[t]he use of any City-owned computer equipment, computer peripherals, City networks, the Internet, e-mail services or other City computer related services." The policy itself is outlined as follows:

> C. Access to all sites on the Internet is recorded and will be periodically reviewed by the City. The City of Ontario reserves the right to monitor and log all network activity including e-mail and Internet use, with or without notice. Users should have no expectation of privacy or confidentiality when using these resources.
>
> D. Access to the Internet and the e-mail system is not confidential; and Information produced either in hard copy or in electronic form is considered City property. As such, these systems should not be used for personal or confidential communications. Deletion of e-mail or other electronic information may

> not fully delete the information from the system.
>
> E. The use of inappropriate, derogatory, obscene, suggestive, defamatory, or harassing language in the e-mail system will not be tolerated.

(Joint Defs' Exhibits Mot. Summ. J., Ex. M at 2). Jeff Quon received a copy of this written policy and signed a form acknowledging he had reviewed and understood the policy on March 18, 2000, a full two-and-a-half years before the events in question in this case arose. (Joint Defs' Exhibits Mot. Summ. J., Ex. L).

After the provision of city-owned pagers to SWAT team members sometime toward the end of 2001 or the beginning of 2002, the department's supervising personnel made statements concerning its use *vis-à-vis* the department's computer usage policy to the staff in general and to Jeff Quon in particular. At a supervisory staff meeting on April 18, 2002, at which Jeff Quon was present, the person in charge of the use and provision of the department's electronic equipment, Lieutenant Steven Duke, reminded those in attendance that "two-way pagers are considered e-mail messages. This means that messages would fall under the City's policy as public information and eligible for auditing." (Joint Defs' Exhibits Mot. Summ. J., Ex. N). This statement was later memorialized in a memorandum sent to all supervisory personnel, including Jeff Quon and Steve Trujillo.

Lieutenant Duke's representation that the department could audit the pagers was not entirely accurate. The department's supervisory staff itself did not have the ability to review the contents of the text messages sent or received by the pagers issued to its employees. (Pls' Index Exhibits Opp., Ex. D at 23). Supervisory staff could not access what transpired over the pagers from their own computers, nor could they log onto Arch Wireless' network from their computers at work to do the same. Instead, to review the contents of the text message sent or received from one of the city-owned pagers, supervisory staff had to contact an Arch Wireless representative and request for them to generate a copy of the transcripts of those messages. (Pls' Index Exhibits Opp., Ex. D at 36).

Insofar as overage charges, it appears that the department – through the actions of Lieutenant Duke – had an unstated policy of agreeing *not* to audit the use of the pagers whenever overages existed so long as the personnel in question paid the department for the overage. Only when the personnel in question disputed the overages – either claiming that the use was work-related or otherwise – did Lieutenant Duke make it clear that he would endeavor to audit the contents of the messages sent and received on the pager. As Lieutenant Duke commented, "[W]e would usually call the employee and say, 'Hey, look, you're over X amount of characters. It comes out to X amount of dollars. Can you write me a check for your overage." (Pls' Index Exhibits Opp., Ex. D at 13).

Lieutenant Duke relayed this unwritten policy regarding the conditions under which an audit of a pager would take place for overages to Jeff Quon.

Within the first or second billing cycle after the pager was issued to Quon, Lieutenant Duke approached him because Quon had exceeded his maximum number of allotted characters. Lieutenant Duke, during this conversation, told Quon that the text messages sent over the City-owned pager "were considered e-mail and could be audited." (Pls' Index Exhibits Opp., Ex. M at 4). Lieutenant Duke, however, went on to say "that it was not his intent to audit employee's text messages to see if the overage is due to work related transmissions." (Pls' Index Exhibits Opp., Ex. D at 69). Instead, Quon "could reimburse the City for the overage so he would not have to audit the transmission and see how many messages were non-work related." (Pls' Index Exhibits Opp., Ex. D at 69). Such an approach was Lieutenant Duke's generous way of streamlining administration and oversight over the use of the pagers because, as he reminded Quon, he could, "if anybody wished to challenge their overage, . . . audit the text transmissions to verify how many were non-work related." (Pls' Index Exhibits Opp., Ex. M at 4). As Lieutenant Duke explained in his deposition: "[W]hat I told Quon was that he had to pay for his overage, that I did not want to determine if the overage was personal or business unless they wanted me to, because if they said, 'It's all business, I'm not paying for it,' then I would do an audit to confirm that. And I didn't want to get into the bill collecting

thing, so he needed to pay for his personal messages so we didn't – pay for the overage so we didn't do the audit." (Pls' Index Exhibits Opp., Ex. D at 70).

Lieutenant Duke testified that this practice ended in August, 2002, when he made it known at a meeting with Chief Lloyd Scharf that he had grown "tired of being a bill collector with guys going over the allotted amount of characters on their text pagers." (Pls' Index Exhibits Opp., Ex. N at 15). The police chief remembered Lieutenant Duke complaining at the meeting that "some members . . . were killing trees in the overages. There was a lot of overages." (Defs' Additional Exhibits in Support, Ex. A at 7). Lieutenant Duke stated that Chief Scharf responded to his complaint by asking him to audit "the transcripts to make a determination whether they had personal use versus – overage or increase the amount of characters, plus – so we just kind of stopped the practice." (Pls' Index Exhibits Opp., Ex. D at 55). In other words, according to Lieutenant Duke, the efficacy of the established monthly character limits was the main impetus for Chief Scharf's ordering the audit.

Another individual, Patrick McMahon, recalled the discussion somewhat differently, suggesting that the main impetus was a concern over using department equipment for personal purposes: "The chief said – or had asked [Duke] if these can be audited to see if these are work-related, and if so work-related, then obviously they're not an issue. However, if they're not work-related, that he wanted that looked

into and addressed as to why people are using the pagers in excess of the amount of monthly characters that were allowed." (Pls' Index Exhibits Opp., Ex. N at 15). This latter recollection of the substance of the meeting was confirmed by Chief Scharf in his deposition: "I asked [Lieutenant Duke] to pull the top two and determine if they were used on duty or for off duty. My concern was – that it was work-related. I didn't want someone playing games or – on company time." (Defs' Additional Exhibits in Support, Ex. A at 8). Chief Scharf acknowledged knowing of Lieutenant Duke's unstated policy of allowing the use of pagers for personal matters when he ordered him to do the audit in question, and he was also aware that the two officers whose pager transcripts he was ordering to be audited had already paid for their overages for the period under review. (Defs' Additional Exhibits in Support, Ex. A at 8). As relayed by Chief Scharf, these points were not material to him in deciding to go forward with the audit:

> Q. . . . on what basis did you believe that the messages could be pulled or reviewed for the top two officers?
>
> A. It was a work-related issue. It was work-related equipment. On that basis, I believed I had access to them.

(Defs' Additional Exhibits in Support, Ex. A at 11).

At the conclusion of this meeting, Chief Scharf ordered Lieutenant Duke to pull the transcripts for the text messages sent on the two officers' pagers for

the period of August to September, 2002, and review the contents of the pager transmissions to "[d]etermine if the usage was on duty or off duty." (Defs' Additional Exhibits in Support, Ex. A at 12). If the messages sent on the pagers while the officers were on duty were not work-related, Chief Scharf expressed concern "that someone was wasting a lot of City time conversing with someone about non-related work issues." (Defs' Additional Exhibits in Support, Ex. A at 12). Chief Scharf appeared rather unconcerned when pressed whether such an audit may uncover personal information about the officers in light of Lieutenant Duke's unstated policy that was in effect during the time those transmissions were made allowing officers to use the pagers for personal, non-worked related reasons:

> Q. . . . Did you give at that time any consideration to the fact that the text messages may contain personal messages or paging text from people not employed by the City of Ontario?
>
> A. No.
>
> Q. You say you didn't think about it one way or the other?
>
> A. That's correct.

(Defs' Additional Exhibits in Support, Ex. A at 12).

In tasking Lieutenant Duke with auditing the pagers, Chief Scharf did not consider whether there was a less intrusive means of conducting the audit;

for instance, Chief Scharf did not consider whether it was advisable to have the text messages reviewed, if at all, in redacted form (*i.e.*, with messages sent or received on off-duty hours redacted to protect Quon's privacy interests). Specifically, when asked whether he considered asking Lieutenant Duke to perform the audit just by reviewing the billing records for the pagers, as opposed to the text transmissions themselves, Chief Scharf responded: "I don't think you could do that, but I don't recall doing that." (Defs' Additional Exhibits in Support, Ex. A at 39).

In performing the audit it was determined that the two employees' pagers that exceeded the character limit for the billing period following this change in policy were Jeff Quon and another officer, Glisson, who is not a party to this case. The department's contact person requested from Arch Wireless the transcripts for the two pagers during the billing period in question – August 1, 2002, to September 31, 2002. The Arch Wireless representative confirmed that the pagers were owned by the City and that the request came from the designated contact person. After satisfying itself of these two points, Arch Wireless provided transcripts of the contents of the messages sent and received by the pagers during the time in question.

The transcripts for Quon's pager tallied forty-six pages in length. Lieutenant Duke reviewed the transcripts. Many of the text messages sent and/or received by Quon's pager while he was on-duty were, to say the least, sexually explicit in nature. Some of

these messages were directed to or from his wife, Jerilyn Quon, while others were directed to or from his mistress, Florio. Other messages, while not sexually explicit were nonetheless private, were sent to and received from his co-worker, Trujillo. When Lieutenant Duke reported the results of his audit to Chief Scharf a few weeks later, Chief Scharf decided that he and Quon's supervisor, Lieutenant Tony Del Rio, should review some of the transcripts themselves. (Defs' Additional Exhibits in Support, Ex. A at 16, 39). When asked whether he felt uncomfortable reviewing such private messages, Chief Scharf seemed puzzled for the basis of the question, stating that "[i]t was of no concern to me as far as the nature of the text. The concern to me was was it [work]-related occurring on duty." (Defs' Additional Exhibits in Support, Ex. A at 16). Chief Scharf thereafter made a determination that Quon's pager was being misused in that "[t]oo much duty time was used for personal pages not associated with duty on duty time." (Defs' Additional Exhibits in Support, Ex. A at 35).

The matter was thereafter referred to internal affairs in October, 2002, for an investigation "to determine if someone was wasting . . . City time not doing work when they should be," which could be potential grounds for misconduct for not paying attention to duty. (Defs' Additional Exhibits in Support, Ex. A at 42-43; Pls' Supplemental Evidence in Support, Ex. B at 59). When asked why an internal affairs investigation was needed (as opposed to just telling Quon to stop using his city-owned pager for

personal use), Chief Scharf responded that an investigation was needed to be fair and to determine if the personal use of the pager occurred while Quon was on-duty. (*Id.*). The internal affairs investigation into Quon was thereafter turned over to Sergeant Patrick McMahon. (Patrick McMahon Aff. P 3).

Sergeant McMahon began the investigation by asking Quon whether he could vouch for how much of his on-duty time was spent using the pager for work-related reasons. (Patrick McMahon Aff. P 4). Quon "indicated that he could not state how much time he spent on the pager during work hours." (*Id.*). Given this response, using Quon's time sheets, Sergeant McMahon took the transcripts and redacted with a black marker those portions that were transmitted while Quon was off-duty. (Patrick McMahon Aff. PP 3-5). Given the amount of pages in the transcripts, Sergeant McMahon enlisted the aid of another member of internal affairs, Sergeant Glenn, to make the redactions. (Patrick McMahon P 4; Def. Glenn Supplemental Submission, Ex. A at 13, 62, 77). While performing these redactions, Sergeant Glenn did more than simply note the time entries and use her marker – it is alleged that she also jotted down the pager numbers the text messages were sent to and received from on Quon's pager and, on at least one occasion, dialed the pager number in question, which happened to belong to Quon's wife, Jerilyn Quon. (Pls' Supplemental Evidence in Support, Ex. B at 64-65, 67; Decl. Jerilyn Quon PP 3-5).

About the same time that the department obtained a transcript of Quon's text messages, Lieutenant Duke conversed with Sergeant Glenn, who was in the midst of conducting the investigation into the above-described corruption at the dispatch center. At some point during this conversation, Sergeant Glenn informed Lieutenant Duke that she "would like to review [the transcripts] after they were dealt with," and that in particular, she "wanted to review messages between [Jeff] Quon and . . . I believe it was April Florio." (Pls' Index Exhibits Opp., Ex. D at 46). No evidence, however, suggests that the transcripts were ever used in the dispatch center investigation. (Def. Glenn Supplemental Submission, Ex. A at 13, 23, 32).

The final event to this rather sordid tale inside the Ontario Police Department concerns Jerilyn Quon's effort to find employment elsewhere after the above events transpired. In January, 2003, Jerilyn Quon applied for a position as a police officer with the City of Upland. Her interview with then Upland Police Chief Martin Thouvenell on February 11, 2003, apparently went so well that she was told the job was hers and she was sent downstairs immediately afterwards to begin filling out paperwork. Chief Thouvenell cautioned Jerilyn as she was leaving the interview that he had one more interview for the position with a person within the Upland police department. A week and a half later, on February 17, 2003, Jerilyn received a letter dated February 12, 2003, informing her that she did not get the job, but that it was being filled by a person in-house. Jerilyn,

apparently borne by her perception of how well her interview had gone, doubted the veracity of this explanation. Instead, she became convinced that the reason she was turned down for the position was because Chief Scharf called Chief Thouvenell and informed him that Jerilyn was suing him in the instant matter for the divulgence of the text messages from her husband's pager.

Plaintiffs then filed the instant suit on February 25, 2003, against Arch Wireless, and a host of governmental entities and employees – the City of Ontario, the Ontario Police Department, its Chief of Police, Lloyd Scharf, and Sergeant Glenn (hereinafter "governmental defendants") – asserting federal claims for violations of the Stored Communications Act and the Fourth Amendment, and state law claims for violations of the California constitution, California Penal Code section 629.86, invasion of privacy, and defamation.

A. *Stored Communications Act*

In 1986, Congress passed the Electronic Communications Privacy Act ("ECPA") "to afford privacy protection to electronic communications" by amending Title III to the Omnibus Crime Control and Safe Streets Act of 1968 (also known as the federal Wiretap Act), which up to that point had only provided statutory protection to land-line "wire and oral communications." *Konop v. Hawaiian Airlines, Inc.*, 302 F.3d 868, 874 (9th Cir.2002). As part of this package

of statutory measures to provide some protection to electronic communications, Congress enacted as Title II to the ECPA the Stored Communications Act ("SCA"), which as its name implies was "designed to 'address[ ] access to stored wire and electronic communications and transactional records.'" *Id.* Towards that end, the SCA prohibits any "person or entity providing" either "an electronic communication service" or a "remote computing service" to "the public" from "knowingly divulg[ing] to any person or entity the contents of a communication while in electronic storage by that service," or "divulg[ing] a record or other information pertaining to a subscriber or customer of such service." 18 U.S.C. § 2702(a). To fulfill the promise these statutory protections were meant to afford, Congress allowed a private right of action to any "person aggrieved by any violation of this chapter." 18 U.S.C. § 2707(a). The Ninth Circuit has noted that, given the statute's age, preceding as it did the mass use of the Internet and the world wide web, its framework at times is "ill-suited to address modem forms of communication," oftentimes requiring courts to "struggle[ ] to analyze problems involving modem technology within the confines of this statutory framework, often with unsatisfying results." *Konop,* 302 F.3d at 874. Such a clash of technology and the current state of the law takes center stage in this case.

To begin, it is doubtful that any of the governmental defendants as they are currently charged in the complaint can be held liable for a violation of the

SCA. None would fall within section 2702(a)'s prohibition as they do not provide any type of electronic service to the public. At best, some were involved in *requisitioning* such service to be provided to their employees from Arch Wireless. This factual circumstance is far removed from what lies at the heart of section 2702's prohibitions, where it is even debatable whether an online retailer is subject to section 2702. *Compare Dyer v. Northwest Airlines Corps.*, 334 F.Supp.2d 1196 (D.N.D.2004) (holding that ECPA does not "encompass businesses selling traditional products and services online"); *Andersen Consulting LLP v. UOP*, 991 F.Supp. 1041 (N.D.Ill.1998) (same) *with United States v. Mullins*, 992 F.2d 1472, 1478 (9th Cir.1993) (summarily holding without analysis that an airline, through its computerized reservation system, was an electronic communications service provider). Here, the governmental defendants' linkage to the electronic service in question is even more tenuous – they provide no electronic services themselves, but purchase the same from a third party, Arch Wireless, who in turn provides a service to the governmental defendants' employees. Holding that the governmental defendants are service providers would stretch the ECPA too far.[2]

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[2] To the extent the governmental defendants would qualify, one of the exceptions to the statute's prohibition – divulgence to the subscriber by a remote computing service, as the Court discusses below *vis-à-vis* Arch Wireless – would apply, thus further absolving the governmental defendants of liability.

Plaintiffs seek to ameliorate this defect by arguing that the governmental defendants should be held liable under section 2703(a), which sets precise limits on a governmental entity's attempt to "require the disclosure by" a service provider "of the contents of a wire or electronic communication" that "is in electronic storage." Reliance on that statutory provision is misplaced. Section 2703 concerns a governmental entity's attempt to gain information in electronic storage *during the course of a criminal investigation.* This criminal investigation nexus is manifested by section 2703's reference to the need for a grand jury or administrative subpoena before an electronic communication in storage may be divulged, functions associated with ongoing criminal investigations. *See* 18 U.S.C. § 2703(b)-(c). Removing all doubt on this point is the section's call for a showing from the government entity that such disclosure is "relevant and material to an ongoing criminal investigation." 18 U.S.C. § 2703(d). Other courts, including the Ninth Circuit, have similarly commented on the criminal investigation nexus to section 2703's prohibitions. *See Konop,* 302 F.3d at 879 ("Section 2703(a) of the SCA details the procedures *law enforcement* must follow to access the contents of stored electronic communications, but these procedures are considerably less burdensome and less restrictive than those required to obtain a wiretap order under the Wiretap Act" (emphasis added)); *see also United States v. Councilman,* 373 F.3d 197, 208-09 (1st Cir.2004) (remarking on section 2703 being the law enforcement counterpart to the Wiretap Act's protections

contained in section 2518) (Lipez, J., dissenting), *overruled by* 418 F.3d 67 (1st Cir.2005) (en banc). Section 2703 has no application to an employer, who happens to be a governmental agency, in its effort to manage its own workforce by auditing the electronic equipment provided to its employees to determine whether they have engaged in workplace malfeasance.

This Court accordingly holds that the governmental defendants do not fall within the statutory prohibitions contained in section 2702(a), that section 2703 has no application to the facts of this case, and, therefore, those defendants are not liable under the Act for any disclosure of the contents of the text messages received or transmitted from Jeff Quon's pager.[3] This then leaves the service provider's exposure under the statute.

Arch Wireless has invoked a statutory defense contained in the SCA that allows for the disclosure of

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[3] Nowhere in their complaint have plaintiffs alleged, nor in their pleadings have they argued, that the governmental defendants should be held liable under section 2707 for aiding and abetting a violation of the statute. *See In re American Airlines, Inc. Privacy Litigation*, 370 F.Supp.2d 552, 556 n. 10 (N.D.Tex.2005) (assuming arguendo that such aiding and abetting liability is possible under the statute). Liability is premised solely on the governmental defendants being a principal in the violation of the statute, hence the plaintiffs' citation to section 2703's prohibition against acts directly committed by law enforcement in seeking the contents of stored electronic files.

the contents of an electronic communication held in electronic storage when it is done "with the lawful consent of the originator or an addressee or intended recipient of such communication [in the case of an electronic communication service], or the subscriber in the case of remote computing service." 18 U.S.C. § 2702(b)(3). Arch Wireless argues that it falls within this exception as it provided a remote computing service and divulged the contents of the text messages on the pager to the subscriber of that service, the City of Ontario. No dispute exists that the City was a subscriber under the statute. What is disputed is whether the service provided by Arch Wireless – that is, of being able to retrieve for its subscribers text messages that have been sent over its communication network and are held in long-term electronic storage on its computers – constitutes a *remote computing service* or, rather, is more properly characterized as an *electronic communication service.* If the former, then the City's consent would serve to absolve Arch Wireless of liability as it was the subscriber to the service. If the latter, then the City's consent is to no avail as only the consent of the originator or intended recipient of such a message (in this case, the plaintiffs themselves) would suffice for the exception to apply.

A remote computing service is defined by the statute as "the provision to the public of computer storage or processing services by means of an electronic communication system." 18 U.S.C. § 2711(2). The term "electronic communication system" referenced

in the definition in turn means, among other things, "any computer facilities or related electronic equipment for the electronic storage of such [electronic] communications." 18 U.S.C. § 2510(14). By way of comparison, an electronic communications service is labeled as one "which provides to users thereof the ability to send or receive wire or electronic communications." 18 U.S.C. § 2510(15).

The service Arch Wireless provides allegedly meets the statutory definition for a remote computing service as it stored the contents of text messages on its computer – the "computer storage" spoken of in the statute – utilizing Arch Wireless' computer network *via* wire and/or radio facilities – the "electronic communication system" noted in the statute. To that end, Arch Wireless compares what it provided to the City of Ontario to that of e-mail, a comparison which the governmental defendants have made both before and after the litigation in this case ensued. The comparison to e-mail is predicated upon Arch Wireless providing long-term storage on its computer network of the text messages sent and received on the City-owned pagers utilizing its communication network. (Def. Arch Wireless Reply at 1 (noting that "opened e-mail that remains on an electronic communications service provider's system after transmission and receipt be covered by the provisions of the statute relating to 'remote computing services.' . . . Here, the messages sent to Jeff Quon's city-owned pager had already been 'opened' and read by Jeff Quon at the time the pager transcripts were requested by the

City. As such, . . . Arch was providing a 'remote computing service' and the statutory exception to liability should apply to Arch")). That Arch Wireless would attempt to make such a comparison is understandable given that e-mail is mentioned repeatedly in conjunction with a remote computing service in the legislative history surrounding the passage of the SCA. *See* H.R. RPT. NO. 99-647, at 64-65 (1986), S. RPT. NO. 99-541, at 3.

The comparison, however, is not a perfect fit. As Mr. Niehamp's declaration makes clear, a message carried over the Arch Wireless network is archived on the company's computer for long-term storage where it can be retrieved later by *company personnel* at the request of the pager's subscriber, in this case the City of Ontario. While this may have the same end result as an e-mail service, in the sense that a message can be recalled that is stored in a third-party's computer network, there is a notable difference. None of the "e-mailed" text messages stored on Arch Wireless' network could be directly retrieved or re-accessed by the subscriber or user after having been opened as is the case with traditional e-mail. Rather, such retrieval occurs only with the assistance of Arch Wireless personnel who, at the behest of the subscriber or user, access the company's network and generate paper copies of the text messages in question that in turn is sent to the customer. Arch Wireless' service therefore cannot be thought of as being e-mail. The question thus becomes whether this direct accessibility feature associated with traditional e-mail is a component

necessary for a service to be considered a remote computing service, and, if not, whether the distinctions that do exist in the statute make the service provided by Arch Wireless more akin to a remote computing service or not.

Plaintiffs argue that such inter-connectivity is mandated, claiming that for something to qualify as a remote computing service subscribers must be able to directly access the stored messages on their own without the need for the intervention on the part of the service providers' personnel. Nothing in the statute's text requires such a direct accessibility component to the service. Again, the statute's definition provides that for something to be considered a remote computing service it need only provide "computer storage or processing services" to the public by utilizing "computer facilities or related electronic equipment." Nowhere does the definition cabin itself to who or how that computer system is accessed. Rather, it allows equally for a computer system that is simply located at an off-site facility separate from the subscriber's work site to suffice as it does for one that also provides for a remote access to that computer system by subscribers of the service. That being said, defendants do acknowledge that reference to the statutory text is "nebulous" as to the accessibility argument. (Def. Arch Wireless's Reply at 1).

To assist the Court in answering this question the parties have brought to the Court's attention a district court opinion that, it is asserted, "construed" the statutory language at issue. *See Steve Jackson*

Games, Inc. v. United States Secret Service, 816 F.Supp. 432 (S.D.Tex.1993). That court's opinion was long on conclusion but short on substance. There the court simply declared, without analysis, that the computer system in that case "was a 'remote computing service,'" but never explained why this was so. *Id.* at 443. Looking to the facts from that case sheds even less light on what distinguished the system in question as being a remote computing service. The system (and the corresponding electronic communications) in question – an e-mail service run on a computer bulletin board – was accessible by the user without the intervention of the web manager of the bulletin board: "[T]he [board] also offered customers the ability to send and receive private e-mail. Private e-mail was stored on the [board's] computer's hard disk drive temporarily, until the addressees 'called' the [board] (using their computers and modems) and read their mail. After reading their e-mail, the recipients could choose to either store it on the [board's] computer's hard drive or delete it." *Steve Jackson Games, Inc. v. United States Secret Service,* 36 F.3d 457, 458 (5th Cir.1994). With such a factual backdrop, nothing in that court's conclusory holding even remotely suggests that it depended on a finding that a remote computing service could or could not exist absent this direct accessibility by the users and/or subscribers. Such accessibility was inherent in the computing system under review before the court in that case and hence, without further elaboration by the court, was not critical to its analysis.

This leads the Court to the statute's legislative history. During the passage of the ECPA both the Senate and the House of Representatives issued reports commenting on various aspects of the legislation, including the reference to "remote computer services." Congress noted that the purpose for the passage of the ECPA was "to update and clarify Federal privacy protections and standards in light of dramatic changes in new computer and telecommunications technologies." S. RPT. No. 99-541, at 1 (1986). Toward that end Congress sought to harmonize the existing statutory framework with the technology and industry standards as they existed in 1987. Congress described such cutting edge technology, which from a modern-day readers perspective would seem antiquated, as follows:

> Today we have large-scale electronic mail operations, computer-to-computer data transmissions, cellular and cordless telephones, paging devices, and video teleconferencing. A phone call can be carried by wire, by microwave or fiber optics. It can be transmitted in the form of digitalized voice, data or video. Since the divesture of AT & T and deregulation, many different companies, not just common carriers, offer a wide variety of telephone and other communications services. It does not make sense that a phone call transmitted via common carrier is protected by the current federal wiretap statute, while the same phone call transmitted via a private telephone network such as those used

> by many major U.S. corporations today, would not be covered by the statute.

S. RPT. NO. 99-541, at 3 (1986). Given Congress' understanding of the technological milieu in which it was legislating, it is not hard to understand the Ninth Circuit's observation that the ECPA has become increasingly difficult to square with more modern technological methods of communication. It is equally obvious from the quotation above that Congress had no conception of the type of communication/storage system at issue in this case when it drafted the statute.

What Congress did clearly intend, even with its 1987 understanding of the relevant communication technology, was for the statute to cover what it considered at the time to be the two relevant technologies used by businesses and individuals – those which were devoted to direct person to person communications *via* private or common carriers, and those communications involving computers. This distinction carried over in Congress' drafting of the SCA.

Under the SCA, the centrality a computer plays in facilitating the communication is key to Congress' definition of a remote computing service. The word "computer" is used exclusively in the statute when speaking of a remote computing service, be it for storage or processing, or for the related "computer facilities" required to accomplish the communications' storage. It is the one of the few means Congress used to identify and distinguish the definition of a "remote

computing service" from an "electronic communication service." Accordingly, the Court finds that, at a minimum, a computer must play a central role in facilitating the storage of the communication, as the legislative history makes clear that the incidental use of computers in providing the service in question was not envisioned by Congress as constituting a remote computing service: "Remote computing services is not intended to apply to computer services offered by the various telephone company central offices in connection with the routing of telephone calls (such as speed dialing, call forwarding, and three-way dialing)." H.R. RPT. NO. 99-647, at 75 (1986).

The central role Arch Wireless' computer facilities played in accomplishing the storage of the text messages, and then recalling the same upon request by the City, is not challenged in this case, and for that reason places the service they provided closer to a remote computing service. That said, this distinction has lost much of its salience since the passage of the ECPA as computers have become increasingly more central to the operation of various forms of electronic communication. Defense counsel acknowledged at oral argument that such a means of distinguishing between the two statutory terms has become "blurred by the progression of technology" such that, in her view, no "viable" means of differentiating the two exists. Plaintiffs seize upon defense counsel's gloomy assessment as proof positive that their interpretation of the statute is necessary lest the statutory terms become meaningless.

To begin, the Court does not share defense counsel's view that the statutory terms have become obsolete as, for the reasons outlined below, at least one other distinguishing and still salient characteristic exists. Similarly, plaintiffs' efforts to breathe life into the statutory terms through a direct accessibility corollary may have the virtue of maintaining a statutory distinction, but it carries with it the vice of having no support in the statute's text or legislative history.

The legislative history reveals that Congress understood that e-mail had a direct accessibility component, but its recognition of this fact was more a matter of describing how e-mail worked than in defining what was needed for a service to qualify as a remote computing service:

> In the case of either electronic mail or voice mail, the sender – a user of the service – has necessarily authorized the addressee's access to the message. The addressee's acquisition of the message is therefore clearly within the contemplation of section 2701(c)[, excepting from the statute's prohibitions "conduct authorized . . . by a user of that service with respect to a communication of or intended for that user"]. Sometimes the addressee, having requested and received a message, chooses to leave it in storage on the service for re-access at a later time. *The Committee intends that, in leaving the message in storage,* the addressee should be considered the subscriber or user from whom the system received the

> communication for storage, and that such communication should continue to be covered by section 2702(a)(2)[, concerning divulgence of communications held in storage on remote computing services].

H.R. Rpt. No. 99-647, at 64-65 (1986) (emphasis added). Nothing in this passage even remotely speaks to Congress expressing a view that only directly accessible electronic communications qualified as a remote computing service. The passage simply describes matter of factly how e-mail operates, and then notes that the retrieval of messages held in long-term storage on the computer after being opened still fall within the purview of a remote computing service. The accessibility of the e-mail was not critical to this conclusion; rather, it is the question of *storage* that is key to understanding Congress' conclusion that the e-mail service in question remained a remote computing service.

One need look to another section of the legislative history to determine that this is so. The Senate Report recognized the *possibility* that such information in computer storage could be accessible by the subscriber/user, but it also recognized that such access can be given by the service provider *after* information has been supplied to it by the subscriber or customer. S. RPT. NO. 99-541, at 10-11 (1986). Must such relaying of information by the subscribers or customers be done by them accessing the subscriber's network or logging a request for the same on their computer network, or can it be phoned in (as in

this case)? Congress' answer was the latter. The Senate Report noted that computer storage in off-site facilities operated by service providers provide "sophisticated and convenient computing services to subscribers and customers from remote facilities" by allowing "processing [to be] done with the customer or subscriber using the facilities of the remote computing service in essentially a time-sharing arrangement, *or it can be accomplished by the service provider on the basis of information supplied by the subscriber or customer. Data is most often transmitted between these services and their customers by means of electronic communication.*" S. RPT. NO. 99-541, at 10-11 (1986) (emphasis added). Congress viewed the storage of such information on the service provider's off-site computer to be the critical factor; how that information came to exist on the service provider's computer, or how that information was later transferred from the provider's computer to the subscriber does not appear material. The Senate Report's mention that use of electronic communication to share or transmit this information was "often" the means of transmission necessarily means that it need not *always* have to be accomplished that way. The sending of written or telephonic requests for transcripts of what is contained on a service provider's computer network can similarly accomplish the processing/storage function contemplated by the statute. That Congress would sanction such a means of transmission in a remote computing service casts aside plaintiffs' push for a direct accessibility gloss to the statute.

Refusing to apply plaintiffs' statutory gloss does not mean, even with the widespread and pervasive use of computers in facilitating electronic communications in the modern day, that the statutory terms do not remain salient. There is another distinction the statute, as it has been interpreted by the courts, draws between the two terms, and one that is not that surprising given the SCA's name and purpose – the length of and the purpose for the storage.

Courts have interpreted the federal wiretap statute to exclude from its coverage the storage of electronic communications no matter how short that storage may entail. *See Konop,* 302 F.3d at 876 (providing a "narrow definition" of intercept for purposes of the federal wiretap statute such that only the "acquisition of a communication," be it wire or electronic, "contemporaneous with the transmission" of that communication falls within the scope of the wiretap statute). Thus, in *Konop* the court held that the "acquisition of email messages stored on an electronic bulletin board system, but not yet retrieved by the intended recipients, was not an interception under the wiretap act." *Id.* Rather, even such transitory storage of electronic communications lasting only a few seconds fell within the SCA's provisions:

> Storage is a necessary incident to the transmission of electronic communications. Email and other electronic communications are stored at various junctures in various computers between the time the sender types the

> message and the recipient reads it. . . . It is therefore argued that if the term 'intercept' does not apply to the *en route* storage of electronic communications, the wiretap act's prohibition against 'intercepting' electronic communications would have virtually no effect. While this argument is not without appeal, the language and structure of the ECPA demonstrate that Congress considered and rejected this argument. Congress defined 'electronic storage' as any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof, 18 U.S.C. § 2510(17)(A), indicating that Congress understood that electronic storage was an inherent part of electronic communication. Nevertheless, . . . Congress chose to afford stored electronic communications less protection than other forms of communication.

Id. at 878 n. 6. That the storage of electronic communications was confined to the provisions in the SCA was a conscious choice by Congress, as it "deliberately structured [the ECPA] to afford electronic communications *in storage* less protection than other forms of communication." *Id.* at 877 (emphasis in original). The removal of all stored communications from the coverage of the wiretap statute makes the treatment of stored communications one of the principal focus points in interpreting the SCA. *See id.* at 888 (Reinhardt, J., dissenting) (noting that the court's decision meant that "all acquisitions of the contents of electronic communications would escape the intercept

prohibition [contained in the wiretap statute] entirely"). That this is so is not surprising given that the "ECPA . . . created the SCA for the express purpose of addressing 'access to *stored* . . . electronic communications and transactional records.'" *Id.* at 879. It therefore should come as no surprise that differences in the length of or the purpose for storing the electronic communication in question would be used by the SCA to differentiate whether the service in question was a remote computing service or an electronic communication service.

The Ninth Circuit in *Theofel v. Farey-Jones,* 359 F.3d 1066 (9th Cir.2004), drew such a distinction in differentiating between a remote computing service and an electronic communication service. In this regard the court used one of the definitions for the term "electronic storage" in section 2510(17):

> Our interpretation [of what constitutes electronic storage for purposes of the federal Wiretap Act] also does not render irrelevant the more liberal access standards governing messages stored by remote computing services. The government's premise is that a message stored by a remote computing service "solely for the purpose of providing storage or computing processing services to [the] subscriber" would also necessarily be stored for purposes of backup protection under section 2510(17)(B) [of the Federal Wiretap Act], and thus would be subject to the more stringent rules governing electronic storage [under the Federal Wiretap Act]. But not all

> remote computing services are also electronic communications services and, as to those that are not, section 2510(17)(B) is by its own terms inapplicable. The government notes that remote computing services and electronic communications services are 'often the same entities,' but 'often' is not good enough to make the government's point. Even as to remote computing services that are also electronic communications services, not all storage covered by sections 2702(a)(2)(B) and 2703(b)(2)(B) is also covered by section 2510(17)(B)[, setting forth more rigorous access standards for messages stored either temporarily or for purposes of backup protection under the federal Wiretap Act]. A remote computing service might be the only place a user stores his message; in that case, the messages are not stored for backup purposes.

Id. at 1076-77.

Theofel's distinction – that the placement of an electronic communication in storage for backup protection keeps the service in question from being a remote computing service – was predicated on the definition of electronic storage contained in section 2510(17)(B). Such reference provides guidance in this case as well. Subsection (17)(A) states that electronic storage includes the "temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof." *Theofel*'s reasoning that section 2510(17) de-marks a means for excluding certain services from the coverage of a

remote computing service would presumably also consider that such intermediate or incidental storage of electronic communications is similarly not considered a remote computing service. Absent the type of storage listed in section 2510(17), the only type of storage left available for a remote computing service to provide is long-term storage of communications not incidental to the transmission of the communication itself and not meant for backup protection. Arch Wireless' service would meet this definition. The storage is long-term, is not incidental to the transmission of the communication itself, and is not meant for backup protection but apparently as the single place where text messages, after they have been read, are archived for a permanent record-keeping mechanism.

Such a distinction makes a great deal of sense when considered in conjunction with other portions of the SCA. Section 2702(b)(3), for instance, exempts from the SCA's prohibition situations in which consent of the sender or receiver of an electronic communication has been given. This exception, however, only applies in the context of an electronic communication service. By confining electronic communication services to, among other things, the incidental storage of communications in the transmission of communications, the statute's exception is reasonable. Consent would be limited to the individuals who are closest in time to the storage – the *cause generis* for the statute's prohibitions. Such a common sense approach

would be placed into question if an electronic communication service could be said to provide long-term storage of communications as well because there would be no need to distinguish between the senders/receivers of the message, on the one hand, and the subscribers to the service, on the other.

This leads to another point that neither side in this case acknowledges – that Congress recognized that service providers can offer a wide variety of different services, each one being characterized differently under the statute; the fact that the services are provided by one provider does not transform the characteristics of each service in question. As the Senate Report acknowledges, "different aspects of the same communication might be characterized differently" because "the transmission of data over the telephone is an electronic communication," but "if the parties use the line to speak to one another between data transmissions, those communications would be wire communications." S. RPT. NO. 99-541, at 16 (1986). By the same token, different aspects of what is provided by a service provider may be characterized differently. The service allowing, for example, a person to transmit text messages from their pager to the recipient's pager and for the recipient to read that message may very well be the provision of an electronic communication service. The subsequent long-term storage of that message on the service provider's computer system for record-keeping purposes by the subscriber may be something entirely different, say a remote computing service. Indeed, the

legislative history reveals that Congress understood such a duality as being possible given the vast array of services a provider could offer: "Existing telephone companies and electronic mail companies are providers of electronic communication services. Other services like remote computing services may also provide electronic communication services." S. RPT. NO. 99-541, at 14 (1986).

The parties in this case apparently take an "all or nothing" approach in characterizing what Arch Wireless provided to the City – either the provision of text-messaging pager/transcript retrieval service was a remote computing system or it was an electronic communications system. From the Court's reading of the legislative history, Congress took a middle course that was predicated both on whether the use of a computer was central to the service in question as well as the length of and purpose for storage of the electronic communication in question. Certain aspects of Arch Wireless' service – the provision of text messaging (perhaps including the 72-hour short-term storage of such messages *before* they are opened and read by the recipient) – were the provision of purely electronic communications system, while others – the retrieval of the contents of those text messages kept in *long*-term storage on its computer network *after* they had been received – were that of a remote computing service. Given that it is the latter service that is at issue in this case, the Court finds that section 2702(b)(3)'s subscriber exception applies.

This finding has wider implications for plaintiffs' state law invasion of privacy and state constitutional claims against Arch Wireless. Those claims are predicated entirely upon Arch Wireless' role in turning over the transcripts of Jeff Quon's pager to the governmental defendants. Arch Wireless asserts that, in light of the Court's above finding, such a claim is preempted by the SCA. In essence, Arch Wireless contends that it cannot be held liable for something (turning over the pager transcripts per the request of the pager's subscriber, the City) that is specifically condoned by the SCA. This argument has great appeal.

As the Ninth Circuit described the preemption doctrine:

> Congress may preempt state law in several different ways. Congress may do so expressly (express preemption). Even in the absence of express preemptive text, Congress' intent to preempt an entire field of state law may be inferred "where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation" (field preemption). State law also is preempted "when compliance with both state and federal law is impossible," or if the operation of state law "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress'" (conflict preemption).

In re Cybernetic Servs., Inc., 252 F.3d 1039, 1045-46 (9th Cir.2001).

Here, the type of preemption in question is one of express preemption. "Express preemption occurs when Congress enacts a statute that expressly commands that state law on the particular subject is displaced." *Gadda v. Ashcroft*, 377 F.3d 934, 944 (9th Cir.2004). "The purpose of Congress is the ultimate touchstone in any preemption analysis, so we look first and foremost to Congress' express statement of its intent," and even then in deducing what Congress meant to preempt "often resembles an exercise in implied preemption analysis." *Metrophones Telecommunications, Inc. v. Global Crossing Telecommunications, Inc.*, 423 F.3d 1056, 1071-72 (9th Cir.2005).

Section 2708 in the SCA provides that, other than pursuit of federal constitutional violations, the remedies outlined in the SCA are the exclusive ones a party may pursue in court for conduct covered by the statute: "The remedies and sanctions described in this chapter are the only judicial remedies and sanctions for nonconstitutional violations of this chapter." Congress' command in enacting section 2708 is clear: Only those remedies outlined in the SCA are the ones, save for constitutional violations, that a party may seek for conduct prohibited by the SCA. The SCA thus displaces state law claims for conduct that is touched upon by the statute, such as in divulging stored electronic communications to third parties. One federal district court, in an unpublished decision, has cited to section 2708 to hold that the statute

completely preempts state law claims arising from *conduct* covered by the SCA. *See Muskovich v. Crowell,* 1995 WL 905403, at *1 (S.D.Iowa March 21, 2005) ("In section 2708, Congress unequivocally expressed an intent to 'occupy the field' and provide the exclusive remedies for conduct regulated by ECPA"). On that point the Court agrees with *Muskovich* that, in enacting the SCA, Congress left no room for supplementary state regulation for conduct covered by the statute. There are other indicia in the statute itself that evinces Congress' effort to make suits to enforce or seek redress for the statute's prohibitions the exclusive ones for parties to pursue. The intricacies of the regulatory scheme crafted by the ECPA (and the SCA) are fairly comprehensive: Regulating private parties conduct, law enforcement efforts to uncover stored electronic communications, and devising a fairly complicated scheme to accomplish both, including a private right of action for violations of the statute's provisions. In light of the breadth of the SCA regulatory scheme and the clear command concerning the exclusivity of remedies (aside from federal constitutional claims) contained in section 2708 for conduct covered by the statute, it stands to reason "that Congress 'left no room' for supplementary state regulation." *Cybernetic,* 252 F.3d at 1045.

Rather than responding to Arch Wireless' argument, plaintiffs argue that the SCA limits its preemptive scope to those matters outlined in section 2707(e) of the statute. Their argument is off mark. Section 2707(e) provides a good faith defense to *liability*

under the SCA, but in no way seeks to limit or confine the preemptive impact the SCA would have on related state law claims. Here, the Court has already found that Arch Wireless is not liable under the statute. The intricacies of whether Arch Wireless is also entitled to a good faith defense to liability is therefore not only a moot point – they are not liable under the statute to begin with – but again says nothing to dampen section 2708's preemptive effect with respect to plaintiffs' state law claims against Arch Wireless.

Accordingly, the Court **GRANTS** summary judgment to all the defendants on plaintiffs' SCA claim and to Arch Wireless on plaintiffs' state invasion of privacy and state constitutional claims.

B. *Fourth Amendment*[4]

Aside from the statutory concerns raised by the auditing of Jeff Quon's pager lies a constitutional question – Was the seizure of these text messages unreasonable per the Fourth Amendment?

The Fourth Amendment, as applied to the States and municipalities through the Fourteenth Amendment, *see South Dakota v. Opperman*, 428 U.S. 364, 365, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976), protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. . . ." A person has Fourth Amendment rights only in those areas and items

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[4] Given that the arguments lodged by the governmental defendants against plaintiffs' invasion of privacy claim and state constitutional claim are the same as those pressed against plaintiffs' Fourth Amendment claim, *see* Defs' Mot. Summ. J. at 33-38, the Court will confine its discussion to the Fourth Amendment. *See Sacramento County Deputy Sheriffs Ass'n. v. County of Sacramento*, 51 Cal.App.4th 1468, 1487, 59 Cal.Rptr.2d 834 (1996) ("Here, we conclude there was no 'offensive' conduct supporting tort liability [for invasion of privacy], for the same reasons there is no constitutional deprivation"). Defendants' argument that the audit was not a serious invasion of plaintiffs' privacy is nothing more than a repackaging of their argument that plaintiffs could have no reasonable expectation of privacy in such communications. (Defs' Mot. Summ. J. at 39 (claiming no serious invasion of privacy as "equipment owned by employer," such monitoring is "very typical in today's workplace" and "it was authorized by the City policies" to which plaintiffs "were aware and had consented to")). As such it too would fail if the Court would hold, as it does, that plaintiffs did have a reasonable expectation of privacy in those communications.

where he or she has "an expectation of privacy that society is prepared to consider reasonable." *O'Connor v. Ortega,* 480 U.S. 709, 715, 107 S.Ct. 1492, 94 L.Ed.2d 714 (1987). The reasonableness of a government employee's expectation of privacy in his or her workplace was addressed by the Supreme Court in *Ortega.* There the court began with the proposition that "[i]ndividuals do not lose Fourth Amendment rights merely because they work for the government instead of a private employer." *Id.* at 717, 107 S.Ct. 1492. That said, some expectations of privacy held by public employees may be unreasonable due to the "operational realities of the workplace." *Id.* For instance, "[p]ublic employees' expectations of privacy . . . may be reduced by virtue of actual office practices and procedures, or be legitimate regulation." *Id.* In any event, "[g]iven the great variety of work environments in the public sector, the question whether an employee has a reasonable expectation of privacy must be addressed on a case-by-case basis." *Id.* at 718, 107 S.Ct. 1492.

Even if a public employee has a reasonable expectation of privacy in the area or item searched by his or her governmental employer, the inquiry does not end there. The Court must still assess the *reasonableness* of the search conducted by the governmental employer: "[P]ublic employer intrusions on the constitutionally protected privacy interests of government employees for noninvestigatory, work-related purposes, as well as for investigations of work-related misconduct, should be judged by the

standard of reasonableness under all the circumstances." *Id.* at 725-26, 107 S.Ct. 1492. Evaluation of the reasonableness of such an intrusion is gauged by looking to "the inception and the scope of the intrusion." *Id.* at 726, 107 S.Ct. 1492. "A search of an employee's office by a supervisor will be justified at its inception when there are reasonable grounds for suspecting that the search will turn up evidence that the employee is guilty of work-related misconduct, or that the search is necessary for a noninvestigatory work-related purpose such as to retrieve a needed file." *Id.* A search is considered reasonable in its scope when "the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the nature of the misconduct." *Id.*

1. *Auditing Quon's Pager*

The parties debate whether Jeff Quon (and the remaining plaintiffs by extension) had a reasonable expectation of privacy in the text messages sent to and from his pager.[5] Both sides acknowledge that the

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[5] Before addressing the merits of the parties' arguments, it appears that one of the remaining plaintiffs, Doreen Klein, has no stake in this claim. She did not send or receive text-messages from Quon; therefore, the auditing of Quon's pager in no way invaded her privacy or amounted to a search or seizure in violation of her Fourth Amendment rights. Defendants have moved to have Klein dismissed as a plaintiff in this matter, and plaintiffs have not filed anything contesting that result. Therefore, insofar as Klein is seeking to press a Fourth Amendment claim against the governmental defendants for auditing of

(Continued on following page)

pager was owned by the City, not Quon; they acknowledge that both written and verbal directives had been issued to Quon, through which the police department reserved the right to audit the contents of the text messages sent and received by the pager; and that Lieutenant Duke had implemented an unwritten policy of foregoing auditing an employee's city-issued pager so long as he or she agreed to pay the overage charges incurred for utilizing the pager for personal use. In light of this agreed-upon factual milieu, it is for the Court then to determine the purely legal questions of (1) whether Quon had a reasonable expectation that any personal messages he sent or received over the pager would remain private; (2) the reasonableness of the audit; and (3) whether Chief Scharf is entitled to qualified immunity

(a) *Reasonable Expectation of Privacy*

A public employee's expectation of privacy is judged against the "operational realities of the workplace" in which the employee works.[6] *Ortega,* 480 U.S. at 715, 107 S.Ct. 1492. The Court would agree with defendants' position that Quon would have no

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Quon's pager, the governmental defendants are awarded summary judgment.

[6] Neither party disputes that Quon (and by extension the other plaintiffs) had a subjective expectation of privacy in the text-messages sent or received on the pagers. Accordingly, the Court shall confine its analysis to whether that expectation of privacy was objectively reasonable.

such reasonable expectation of privacy if all that was before it was the fact that Quon had been informed in writing and in person that the City considered the use of the pagers to fall within its e-mail policy, and that the City would monitor the use of its pagers, including auditing what messages were sent and received by them at any time. All of this would have put any employee on fair notice that the communications that were transmitted over the pager were, in essence, open to the public for view. *See Ortega,* 480 U.S. at 719, 107 S.Ct. 1492 (noting that expectation of privacy not reasonable where employer has a "regulation or policy discouraging employees . . . from storing personal papers and effects in their desk or file cabinets"); *Schowengerdt v. General Dynamics Corp.*, 823 F.2d 1328, 1334, 1335 (9th Cir.1987) (agreeing that "public employees' expectations of privacy may be reduced by virtue of actual office practices and procedures" such as "notice from his employer that searches of the type to which he was subjected might occur from time to time for work-related purposes").

Thus, for instance, in *Bohach v. City of Reno,* 932 F.Supp. 1232, 1234-35 (D.Nev.1996), the district court held that a department memorandum informing employees that messages sent on city-issued pagers would be logged on the department's network and that certain types of messages were banned in conjunction with the fact that such recording of messages is "part of the 'ordinary course of business' for police departments" diminished any expectation of privacy the employee had in what he sent or received on his

pager. Similarly, in *United States v. Ziegler*,, 456 F.3d 1138 (9th Cir.2006), the Ninth Circuit held that a company's ownership of the employee's workplace computer, the regular monitoring of the use of the employees' workplace computers, the issuance of a company policy announcing that such monitoring would take place, and the dissemination to its employees of a prohibition from using the computer for private use defeated any objective expectation of privacy those employees may have had in their workplace computers. *Id.* at 1146.

This "operational reality," however, was fundamentally transformed by Lieutenant Duke's conscious decision not to enforce this policy. Apparently not wanting to devote resources to reviewing the contents of text messages sent or received from pagers that exceeded the monthly character limit, Lieutenant Duke made it clear to the staff, and to Quon in particular, that he would *not* audit their pagers so long as they agreed to pay for any overages. Given that Lieutenant Duke was the one in charge of administering the use of the city-owned pagers, his statements carry a great deal of weight. Indeed, before the events that transpired in this case the department did not audit any employee's use of the pager for the eight months the pagers had been in use. This was true even when overages were involved. Lieutenant Duke in effect turned a blind eye to whatever purpose an employee used the pager, thereby vitiating the department's policy of any force or substance. By doing so, Lieutenant Duke effectively provided

employees a reasonable basis to expect privacy in the contents of the text messages they received or sent over their pagers; the only qualifier to guaranteeing that the messages remain private was that they pay for any overages. *See United States v. Slanina,* 283 F.3d 670, 677 (5th Cir.2002) ("given the absence of a city policy placing Slanina on notice that his computer usage would be monitored and the lack of any indication that other employees had routine access to his computer, we hold that Slanina's expectation of privacy was reasonable"); *Leventhal v. Knapek,* 266 F.3d 64, 74 (2nd Cir.2001) (holding employee had reasonable expectation of privacy in "storing personal items in his office computer" where, despite employer's policy prohibiting use of state equipment "for personal business," employer acknowledged that "employee would not violate state policies by keeping a personal checkbook in an office drawer, even though it would take up space there"); *Adams v. City of Battle Creek,* 250 F.3d 980, 984 (6th Cir.2001) (noting no diminished expectation of privacy where "defendants . . . did not routinely monitor officer's pagers or give notice to officers that random monitoring of their department-issued pagers was possible" and "where the policy" against "personal use" of such pagers "had not been enforced"); *Cf. Ziegler,* 456 F.3d 1138, 1144 n. 10 (recognizing that situation would be fundamentally different where "employer failed to implement a policy limiting personal use of or the scope of privacy in the computers, or had no general practice of routinely conducting searches of the computers").

That the p ger in question was owned by the City adds nothing by itself to the analysis. A *per se* rule that public employees cannot have a reasonable expectation of privacy when using property owned by their employer would be at odds with the Supreme Court's holding in *Ortega*. There the Supreme Court held unanimously that the employee could have a reasonable expectation of privacy in the personal items he stored in a desk that was presumably owned by his employer. *Id.* at 719, 107 S.Ct. 1492. Expectations of privacy are not tied up by reference to property law. *See Katz v. United States,* 389 U.S. 347, 352, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967); *Schowengerdt,* 823 F.2d at 1333 ("Fourth Amendment privacy interests do not, however, turn on property interests. . . . the [United States Supreme] Court rejected the contention that those who seek to invoke Fourth Amendment protections must have a property right in the area searched"). As the Ninth Circuit recently explained in *Ziegler:* "We do not hold that company ownership of the computer is alone sufficient to defeat an expectation of privacy. . . . As always, the issue depends on what expectations may reasonably coexist with that ownership." 456 F.3d 1138, 1146 n. 11. Here, any lessened expectation of privacy in one's pager messages due to it belonging to the City was canceled out by what the City, through Lieutenant Duke, communicated to its officers on how they could use that equipment.

Similarly, defendants' plea that the use of such equipment in the workplace is entitled to a lesser

expectation of privacy given "community" or "social norms" – specifically, that "with the proliferation of" various electronic communication systems "in the work place, it is extremely common for employers to monitor employee usage of these devices and systems" – loses its salience in light of the particular circumstances of this case. (Gov't Defs' Mot. Summ. J. at 36). Appeals to broad societal norms quickly give way once an employer, like the defendants in this case, promulgates and announces a policy to its employees detailing how much privacy to expect in using specified equipment. At that point such general norms are trumped by the *particular* norm that was implemented in the work place in question. *See Ziegler,* 456 F.3d 1138, 1145 ("we take societal expectations as they are, not as they could or (some think) should be") (citing *United States v. Silva,* 247 F.3d 1051, 1055 (9th Cir.2001)). The Court finds that it is unreasonable to expect that an employee would assume that some other *unstated* norm should inform their opinion on how much privacy to expect in using an employer's equipment once that employer expressly informs his or her employees of an *actual policy* regarding the use of that very equipment. Here, Lieutenant Duke's actions eroded any attempt on defendants' part to lessen the expectation of privacy its employees had in the use of the pagers issued to them; indeed, his actions could be said to have *encouraged* employees to use the pagers for personal matters. *See Ortega,* 480 U.S. at 719, 107 S.Ct. 1492 (holding employee had a reasonable expectation of privacy where there was "no evidence that the Hospital

had established any reasonable regulation or policy discouraging employees . . . from storing personal papers and effects in their desks or file cabinets").

Governmental defendants finally argue that Quon's expectation of privacy was unreasonable given that any message sent to or from his pager was potentially subject to public disclosure under the California Public Records Act ("CPRA"). (Gov't Defs' Reply at 6). The CPRA mandates that "public records are open to inspection at all times . . . and every person has a right to inspect [the same], except as hereafter provided." CAL. GOV'T CODE § 6253(a). Public records are defined as "any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." CAL. GOV'T CODE § 6252(d). The problem with defendants' argument is its sheer breadth. Anything and everything that *could* be subject to disclosure under the CPRA would necessarily defeat any expectation of privacy an individual employee may have in the same. The evidence is not commensurate with the breadth of defendants' argument. There is no evidence before the Court suggesting that CPRA requests to the department are so widespread or frequent as to constitute "an atmosphere 'so open to fellow employees or the public that no expectation of privacy is reasonable.'" *Leventhal*, 266 F.3d at 74 (quoting *Ortega*, 480 U.S. at 718, 107 S.Ct. 1492). Indeed, defendants' argument is quite the opposite: That the mere *possibility* someone in the

public *may* make such a request is sufficient to defeat any expectation of privacy in the officers' communications on the pagers. This type of conjectured, hypothecated search of the pager transmissions by the general public does not destroy any underlying expectation of privacy an employee in Quon's position could otherwise possess in the messages sent from or received by an office pager. As was made clear in *Ortega,* "constitutional protection against *unreasonable* searches by the government does not disappear merely because the government has the right to make reasonable intrusions in its capacity as employer." 480 U.S. at 717-18, 107 S.Ct. 1492 (emphasis in original).

Moreover, the Court is not convinced that, even assuming such public records requests were frequent occurrences, the facts in this case would not, given the particulars of Lieutenant Duke's unstated policy, still entitle the officers from having an objectively reasonable expectation of privacy in their pager transmissions. Again, even under Fourth Amendment analysis in the public employment context, "[t]he employee's expectation of privacy must be assessed in the context of the employment relation." *Ortega,* 480 U.S. at 717, 107 S.Ct. 1492. That someone in the public at large *could* make a CPRA request to look at the item in question does not mean that the individual employee cannot have a reasonable expectation of privacy that his employer will not do the same. As noted above, such Fourth Amendment balancing is determined on a "case-by-case basis" with reference to

the regulations, policies, and practices put in place by their employer at the particular work setting. *Ortega,* 480 U.S. at 717-18, 107 S.Ct. 1492.

Thus, in *Zaffuto v. City of Hammond,* 308 F.3d 485, 489 (5th Cir.2002), the Fifth Circuit rejected the argument that, simply because the contents of telephone recordings made at work were subject to disclosure under Louisiana's public records law, the police officers had no reasonable expectation of privacy in out-going telephone calls made from the police department's communications room. The court found that the officer's belief that the department's policy was that only *incoming* calls would be recorded could lead an officer to have a reasonable expectation that *out-going* calls would remain private, even if those calls were in fact recorded by the department and hence subject to disclosure under the state's public records law. *Id.* Here, the officers were told that, so long as they paid overages, no audits would be performed. An officer confronted with such a policy could, like the police officers in *Zaffuto,* reasonably expect that so long as they paid the overages the department would not audit, and hence, would not retain any files (defeating the possibility of disclosure under the CPRA) regarding what was sent to or received by their pager. Given such an understanding of the particular work-setting, coupled with the lack of any evidence that such CPRA requests were frequent or widespread, the Court finds that potential disclosure of the transcripts of the text messages to the public under the CPRA does not detract from the

reasonableness of Quon's privacy expectation concerning the same.

(b) *Reasonableness of the Audit*

Having found that Quon had a reasonable expectation of privacy in the messages sent and received by the city-issued pager, the Court must next determine whether the auditing of that pager was "reasonable under the circumstances." *Schowengerdt,* 823 F.2d at 1335. In addressing this question (as well as the final question, concerning qualified immunity) the Court is confronted with a factual dispute which, for the reasons outlined below, is a material one. This factual dispute prevents the awarding of summary judgment to either side in this case, requiring instead that this matter be submitted to a jury. The dispute in question concerns the actual *purpose* or *objective* Chief Scharf sought to achieve in having Lieutenant Duke perform the audit of Quon's pager. Chief Scharf stated in his deposition testimony that the goal of the audit was to see whether officers were using their pagers to "play games" while on duty, something which he termed as misconduct because it took the officer's attention away from their work. Lieutenant Duke's deposition testimony, however, alludes to another reason for the audit – to determine whether there was a need to "increase the amount of [monthly] characters" allotted for work-related usage.

Insofar as the audit was meant to ferret out misconduct by determining whether the officers in question were "playing games" with their pagers or otherwise "wasting a lot of City time conversing with someone about non-related work issues," the Court finds the audit was *not* justified at its inception. Key to the Court's finding on this point is the fact that the officers' pagers were audited for the period when Lieutenant Duke's informal, but express policy of *not* auditing pagers unless overages went unpaid was in effect. As discussed above, that policy essentially informed department personnel equipped with city-issued pagers that, so long as they paid for the overages, the department was *not* going to audit their pagers to determine whether the overage was on account of them using the pager for personal matters, whatever that might be. It was only when the officer in question *contested* the overage by asserting that its excess use was for business reasons that an audit would be performed. Given this policy, it cannot be said that determining whether the officers went over the character limits during this period because they used the pagers for personal matters (or, in Chief Scharf's parlance, "wasting time playing games" while on duty) was "misconduct"; it was the very conduct Lieutenant Duke's informal policy allowed, condoned, and even encouraged. For a search to be considered justified at the inception when it is meant to discover workplace misconduct, there must exist "reasonable grounds" to suspect that such evidence of misconduct would be uncovered by the search in question. In light of Lieutenant Duke's policy, the

search would not have revealed misconduct; rather, it would have uncovered conduct permitted by Lieutenant Duke to occur.

The result would, of course, be different if Chief Scharf had asked for an audit of pagers for a period of time *after* Lieutenant Duke's policy ended and the termination of that policy had been communicated to the officers. At that point, the use of the pagers to "play games" while on duty may well have been considered misconduct under the policy then in effect. Here, the audit as implemented could not in any way turn up evidence of such misconduct as the period being audited expressly allowed, per Lieutenant Duke, for the officers to use the pagers in the manner now objected to by Chief Scharf.

This leaves the other possible purpose advanced for the audit (and one pressed as such by the defendants) – determining the utility or efficacy of the existing monthly character limits. Under this rationale, the audit was done for the benefit of (not as a punishment against) the officers who had gone over the monthly character limits. Under Lieutenant Duke's policy and practice, it was understood that, unless contested by the officer, all of the overage was considered as personal use, a fact confirmed by the officer's subsequent payment for the same. The department, however, was allegedly concerned that some of the overages – but perhaps not a large enough percentage to warrant an officer to seek an audit by contesting the overage charges – may have been attributable to work-related use of the pager.

That is, the purported concern was not that the officers were engaged in misconduct, but that the officers were paying too much in overages because the character limits were, on the one hand, not high enough to capture all the work-related usage of the pagers, but, on the other hand, not low enough to encourage them to contest the same. To make sure that some of the overages for which the officers were paying was not work-related, the audit was performed to see, in fact, how many characters were being used for business reasons. If more than the monthly character limits were so used, the department would increase the character limits so that the officers would not have to pay for any of their work-related duties out of their own pocket.

The governmental defendants argue that the search, with such an underlying rationale as just described, was justified at its inception because Jeff Quon "had gone over the allotted number of characters," and the "City needed to determine why only he and one other officer had done so." (Defs' Mot. J. Pleadings at 7). Defendants next argue that the scope of the search was reasonable because it was directed precisely at the reason for the search itself: "The purpose of the search was simply to determine whether or not the character limit was to be increased, as had been previously done. In order to make such a determination, the messages had to be reviewed to determine what percent were business versus personal." (Defs' Mot. J. Pleadings at 8). While the Court may not find this convincing in light of

much of the deposition testimony it has reviewed, the Court does find that, *if* a jury were to find that this was in fact the purpose for the audit, the audit would both be justified at its inception and would be reasonable in its scope.

In order for the department to determine whether there existed hidden work-related costs borne by its officers that were brought about by the number of monthly characters allowed for the pagers (in the sense that the percentage was not large enough to incentivize the officer in question to contest the overage charge), it would be necessary to actually look at the transcripts of the text-messages themselves. Only by looking at the actual number and type of characters used for a given period could the department determine whether there existed such hidden costs. In performing this audit, the department limited its audit to just those officers that had exceeded the monthly character limits for the time in question, which would be understandable if the reason for the audit was to make sure officers who have exceeded the character limits were not paying hidden work-related costs in those overage charges. *See Schowengerdt,* 823 F.2d at 1336 ("the scope of the inquiry must be no broader than necessary . . . [,] if the depth of the inquiry or extent of the seizure exceeded that necessary for the government's legitimate purposes, . . . the search would be unreasonable").

The plaintiffs question the reasonableness of the scope of the audit under this theory, suggesting that

the department could have achieved its goal by asking the officers themselves whether some of the overages were for work-related reasons, or by looking only at the telephone numbers dialed by (as opposed to the text messages themselves sent by) the officers. "[I]f less intrusive methods were feasible," that would play into the reasonableness of the audit's scope. *Schowengerdt,* 823 F.2d at 1336. Neither proposition advanced by plaintiffs, however, adequately serves this rationale for the audit. Even if talking to the officers beforehand may have brought to light information that some of the overages in question were for work-related reasons, only by performing an audit of the text messages themselves could the department confirm that the officers' recollection was accurate (which may be less than reliable given the passage of time since the messages were typed or read on the pager by the officer). Looking at the telephone numbers dialed by the officers is equally problematic. Although the telephone numbers may be a means of determining whether the person who was paged was a co-worker, that fact alone does not provide any definitive answer as to *what* those individuals were text-messaging each other about. As demonstrated by the actual audit that was performed in this case, text-messaging a fellow employee could be done largely for personal, not work-related, reasons. Thus, the only way to accurately and definitively determine whether such hidden costs were being imposed by the monthly character limits that were in place was by looking at the actual text-messages used by the officers who exceeded the character limits.

Accordingly, the Court finds that if the purpose for the audit was to determine if Quon was using his pager to "play games" and "waste time," then the audit was not constitutionally reasonable, and performing the same violated the Fourth Amendment rights of Quon and those to whom he communicated. On the other hand, if the purpose for the audit was to determine the efficacy of the existing character limits to ensure that officers were not paying hidden work-related costs, then the Court finds that no constitutional violation occurred. A jury shall decide, based on the evidence, which was the primary purpose of the audit.

(c) *Qualified Immunity*

Having found a constitutional violation under one (but not the other) of the potential rationales for the audit, the Court must determine whether Chief Scharf is entitled to immunity from suit as to that violation based on his argument that the uncertainty in the law at the time he ordered the audit was such that a reasonable officer would not have known that his act violated the Fourth Amendment.

"[G]overnment officials . . . generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). Such "immunity from suit" flows from the acknowledgment

"that reasonable mistakes can be made as to the legal constraints on particular police conduct." *Saucier v. Katz,* 533 U.S. 194, 205, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). To decide whether a police officer is entitled to qualified immunity, a court must first determine whether the facts "[t]aken in the light most favorable to the party asserting the injury[, *i.e.*, the plaintiff,] . . . show [that] the officer's conduct violated a constitutional right. . . ." *Id.* at 201, 121 S.Ct. 2151. If so, the next step is to ask whether "the right [that was violated] was clearly established . . . in light of the specific context of the case." *Id.* In other words, "would [it] be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 202, 121 S.Ct. 2151.

For the reasons stated above, Chief Scharf's ordering of the audit, under the guise of seeking to ferret out misconduct (that is, "playing games" and "wasting time"), violated plaintiffs' constitutional rights.[7] This leaves the question of whether violation of that right was clearly established at the time Chief Scharf ordered the audit of Quon's pager. *Saucier* provides that, "[f]or a right to be clearly established, it must be defined with sufficient specificity that a reasonable officer would have known he was violating

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[7] For purposes of qualified immunity at this stage, the Court must construe the facts in favor of plaintiff and thus will assume for purposes of this section that discovery of "misconduct" was the Chief's purpose for the audit. *Saucier,* 533 U.S. at 201, 121 S.Ct. 2151.

it." *Haugen v. Brosseau,* 339 F.3d 857, 873 (9th Cir.2003), *overruled on other grounds,* 543 U.S. 194, 125 S.Ct. 596, 160 L.Ed.2d 583 (2004). As one court remarked, officials will not stand trial "for 'bad guesses in gray areas' but only for 'transgressing bright lines.'" *Doe v. Broderick,* 225 F.3d 440, 453 (4th Cir.2000). If Chief Scharf made a reasonable mistake about what the law requires, he is immune from suit. *Id.* ("qualified immunity exists to protect those officers who reasonably believe that their actions do not violate federal law").

Here, Chief Scharf argues that he made such a reasonable mistake as certain facts could lead a reasonable official to conclude that Quon did not have a reasonable expectation of privacy in the communications made over the pager: (1) Quon was aware of the department's written policy that pager communications could be audited; (2) the messages sent or received on the pagers were subject to disclosure under the CPRA; and (3) the district court's decision in *Bohach* had upheld the auditing of pagers under circumstances similar to those in this case. (Gov't Defs' Mot. J. Pleadings at 13-14). None of these facts withstand scrutiny as, individually or collectively, they fail to acknowledge the one additional, undisputed fact that Chief Scharf was also aware of at the time he ordered the audit: Lieutenant Duke's informal policy of allowing officers to use the pagers for personal matters so long as they paid for any overages; audits would only be done if the officer

contested payment of overages on grounds that the overage was work-related.

Even before the Supreme Court's decision in *Ortega*, it was well-established that a public employee "would enjoy a reasonable expectation of privacy in areas given over to his exclusive use, unless he was on notice from his employer that searches of the type to which he was subjected might occur from time to time for work-related purposes." *Schowengerdt*, 823 F.2d at 1335; *see also Ortega v. O'Connor*, 146 F.3d 1149, 1157 (9th Cir.1998) (holding that even as far back as 1981 it was clearly established that, "in the absence of an accepted practice or regulation to the contrary, government employees . . . had a reasonable expectation of privacy in their private offices, desks, and file cabinets"). That is to say, a reasonable official would have understood that a public employee's expectation of privacy was defined by "the existence and scope of policies and practices or regulations relating to searches at" the work site. *Schowengerdt*, 823 F.2d at 1335.

All of the circumstances advanced by Chief Scharf do not make any room for this one critical piece of evidence necessary in evaluating Fourth Amendment questions in the public employment context – namely, the operative policy in effect for the period the audit was ordered to be performed. In *Bohach*, for instance, the policy in place at the time of the audit expressly prohibited the use of pagers for personal matters, something which is not true in this case. The department's written policy mentioned by

Chief Scharf was countermanded (and Chief Scharf was aware of this countermand at the time he ordered the audit) by Lieutenant Duke's informal practice in managing and overseeing the use of the pagers. Under the policy here, personal use of pagers for private matters was expressly permitted provided any overage was paid. This places the case in a fundamentally different legal setting where, before the events in this case took place, an employee's expectation of privacy has been held by courts to be objectively reasonable if the employer has no policy limiting personal use of workplace equipment or fails to enforce a policy regarding the same. *See Slanina,* 283 F.3d at 676-77; *Leventhal,* 266 F.3d at 74; *Adams,* 250 F.3d at 984.

As far as the CPRA argument, as the Court has previously observed, defendants' position simply posits the *possibility* that such a request could be made which, they argue, would therefore negate an employee's expectation of privacy; however, the argument lacks any accompanying showing that Chief Scharf was aware of a *single* such instance, let alone that such requests were frequent or widespread. As such, the argument transgresses the Supreme Court's statement in *Ortega,* made long before the facts of this case, that an employer's *right* to intrude on an employee's work site does not, on its own, take away any expectation of privacy that an employee may have to the same. 480 U.S. at 717-18, 107 S.Ct. 1492. Indeed, defendants' line of analysis would trade away the key inquiry in the public

employment setting by focusing on how the employer's workplace *could* operate instead of how it *actually* operates. *See Ortega,* 480 U.S. at 717, 107 S.Ct. 1492 (noting that a "public employees' expectations of privacy" are tied to "actual office practices and procedures"); *Ziegler,* 456 F.3d 1138, 1145 ("we take societal expectations as they are, not as they could or (some think) should be").

As Chief Scharf knew, the policy Lieutenant Duke had put in place clearly gave officers reason to believe that what they sent or received over their city-issued pagers would not be audited unless they precipitated such an audit by contesting the overages. In short, the facts in this case did not present Chief Scharf with a "gray area, where the law is unsettled or murky," *Broderick,* 225 F.3d at 453, but one, given the policy in effect at the time, that clearly indicated that what he was doing invaded the plaintiffs' reasonable expectations of privacy.

Accordingly, the Court finds that Chief Scharf is not entitled to qualified immunity.

2. *Seizure of Klein and Florio's Personal Pagers and Cell Phones*

This then leaves the question of whether seizure of Klein and Florio's cell phones and pagers violated the Fourth Amendment. In this regard, defendants apparently concede that Klein and Florio had a reasonable expectation of privacy in their personal cell phones and pagers, *see Schowengerdt,* 823 F.2d at

1335 (noting that employees have a reasonable expectation of privacy over items "given over to [their] exclusive use"), and instead shift to arguing whether the seizure of cell phones and pagers during the interview by internal affairs personnel was reasonable under the circumstances.

Defendants assert that the seizure of the cell phones and pagers was reasonable as it was necessary to prevent Klein and Florio from obstructing the investigation by using these devices to communicate to one another during the interview to coordinate and harmonize their testimony. Plaintiffs challenge the reasonableness of the seizure's scope, noting that even if this was the purpose behind the seizure other measures short of taking their cell phones and pagers could, and were, in fact, employed by defendants to curb such compromise of the investigative process. It is noted that the defendants kept the two women separated from one another during the interview and that each was kept under watch by internal affairs personnel through a one-way window. Certainly, "if less intrusive methods were feasible," that would play into the reasonableness of the seizures scope. *Schowengerdt,* 823 F.2d at 1336.

The alternatives suggested by plaintiffs, however, do not adequately address the concerns prompting the seizure – thwarting the plaintiffs' ability to manufacture their testimony by communicating with one another during the interrogation process. True, separating the two from one another would keep them from being able to directly communicate with

one another to manufacture their testimony, but such physical segregation does nothing to impede the plaintiffs' ability to communicate with one another using their pagers and cell phones. Similarly, having the plaintiffs under surveillance by internal affairs personnel *via* the one-way mirror in an interrogation observation room may assist in detecting such surreptitious electronic communication as it happens but it would do nothing to actually stop the communication before it occurs. The Court therefore finds that the seizure of Klein and Florio's pager and cell phone during their interrogation by internal affairs personnel was reasonable under the circumstances.

Accordingly, the Court **GRANTS** defendants summary judgment insofar as plaintiffs Florio and Klein's Fourth Amendment claim for the seizure of their cell phones and pagers, and **GRANTS** defendants summary judgment insofar as Klein seeks to assert a Fourth Amendment claim (and related state law claim) for the audit of Quon's pager, but **DENIES** defendants summary judgment as to the remaining plaintiffs' Fourth Amendment claim and related state claims concerning the seizure of the contents of the text messages sent and received on Jeff Quon's city-owned pager.

C. *GOVERNMENTAL IMMUNITY TO STATE LAW CLAIMS*

Governmental defendants also argue that plaintiffs' related state law claims are barred by governmental immunity. California Government Code

section 821.6 provides, "[a] public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause." The policy behind section 821.6 is to encourage "fearless performance of official duties. . . . State officers and employees are encouraged to investigate and prosecute matters within their purview without fear of reprisal from the person or entity harmed thereby. Protection is provided even when official action is taken maliciously and without probable cause." *Shoemaker v. Myers,* 2 Cal.App.4th 1407, 1424, 4 Cal.Rptr.2d 203 (1992). Furthermore, section 821.6 is not limited to conduct occurring during formal proceedings: "[I]t also extends to actions taken in preparation for formal proceedings. Because investigation is 'an essential step' toward the institution of formal proceedings, it 'is also cloaked with immunity.'" *Amylou R. v. County of Riverside,* 28 Cal.App.4th 1205, 1209-1210, 34 Cal.Rptr.2d 319 (1994). It is this last point that the parties debate in their papers. The plaintiffs argue that the auditing of Quon's pager could not have been a prelude to the institution of administrative proceedings against him as there was no proceeding to institute against him as a result of the audit – his use of the city-issued pager for personal matters was conduct that was permissible under the policy then in effect. (Pls' Mot. Judg. Pleadings at 11). The governmental defendants respond that Chief Scharf was "investigating why officers were going over the character limits" and then term this investigation a

"legitimate proceeding" as it would "ensure officers do not abuse equipment assigned to them." (Gov't Defs' Opp. to J. Pleadings at 15-16). The logic of defendants' argument (its circularity notwithstanding) in no way addresses the point raised by plaintiffs: The "in preparation" language noted in the case law refers to those investigations that give rise to or are somehow tethered to something that could have been investigated by the official in question in the first place. Simply labeling something an "investigation" does not make it so. A nexus must exist between the thing being investigated and the possibility of a proceeding being instituted. To hold otherwise would allow public officials to escape liability for any act they took so long as they were able to state that the act was part of an investigation. Here, Chief Scharf's "investigation" was for something that could never lead to the institution of formal proceedings: Either it was meant to determine whether to raise character limits, which is obviously not an administrative or judicial proceeding, or it concerned conduct that Chief Scharf knew in advance was sanctioned by his department (through Lieutenant Duke) for the period in question. As such the Court finds that governmental immunity under section 821.6 is not applicable for the actions under review in this case.

D. *DEFAMATION*

Jerilyn Quon asserts that the reason why she did not receive the job with the Upland police department is because Chief Scharf contacted the Upland police

chief and disparaged her by commenting that she had sued him for divulging the contents of her then husband's pager. The defamation claim may be easily dispatched. For a defamation claim to be made there must be "the intentional publication of a statement of fact that is false, unprivileged, and has a natural tendency to injure or which causes special damages." *Smith v. Maldonado,* 72 Cal.App.4th 637, 645, 85 Cal.Rptr.2d 397 (1999). None of the elements for such a claim exist in this case. Jerilyn Quon, to this day, despite having gone through extended discovery, has been unable to describe except in the most general of terms the nature of this defamatory comment. All she can proffer is conjecture that a statement must have been made and that this surmised statement must have something to do with her suing Chief Scharf. *See Melaleuca, Inc. v. Clark,* 66 Cal.App.4th 1344, 1350, 78 Cal.Rptr.2d 627 (1998) ("the law of defamation and the law of injurious falsehood require that a plaintiff prove far more than the publication of a false statement"); *Seelig v. Infinity Broadcasting Corp.,* 97 Cal.App.4th 798, 809, 119 Cal.Rptr.2d 108 (2002) ("plaintiff must present evidence of a statement of fact that is provably false"). The most glaring problem with this "evidence" (leaving aside whether such a statement is even untrue) is that the present lawsuit was not even filed until February 25, 2003, more than two weeks *after* the alleged statement was made. Chief Scharf's statement that Jerilyn Quon was suing him simply could not have taken place as he had not even been sued at the time the statement was allegedly made.

Even more problematic for Jerilyn Quon is that she has no proof that Chief Scharf said anything to Chief Thuvenall [sic]. Both have submitted affidavits indicating that they did not speak to each other about Jerilyn Quon in general or about her application in particular. (Aff. Lloyd Scharf ¶ 2; Aff. Martin Thouvenell ¶ 2). Her attempts to paper over these glaring omissions in her proof by resort to evidentiary "inferences" in retaliation claims only further demonstrates the paucity of her proof on this claim. To begin with the obvious, what may be sufficient to make out a retaliation claim says very little for an entirely separate cause of action, such as defamation, with its own separate and divergent elements of proof. A retaliation claim does not require that a plaintiff prove what was said or that the defendant said it, but allows proof through inferences to abound as a proper method of marshaling one's evidence. The same cannot be said about a defamation cause of action. Proof that the defendant actually made a statement to someone is critical for liability to attach. *See Scott v. McDonnell Douglas Corp.*, 37 Cal.App.3d 277, 291, 112 Cal.Rptr. 609 (1974) ("as to these latter utterances the complaint fails to allege that these statements were ever published or made known to any third person. Thus an action in defamation would not lie, there being no publication"). That Jerilyn Quon may surmise that a statement must have been made because otherwise she would have gotten the job is not proof that it was so, much less that Chief Scharf was the one who made this hypothesized statement. *Res ipsa loquitor* has no place in defamation claims.

Without such direct proof about what the defamatory comment actually was and that the defendant actually made that comment to someone else, summary adjudication in favor of the defendants is required. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) (holding that summary judgment is in order when "the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof").

Accordingly, the governmental defendants are **GRANTED** summary judgment with respect to the defamation claim.

E. *CALIFORNIA PENAL CODE SECTION 629.86*

Plaintiffs have not filed an opposition to the governmental defendants' argument that their state law claim under California Penal Code § 629.86, which prohibits the interception of wire and electronic communications, is barred as the text messages in question were in electronic stored files. This Court has previously ruled that such a claim is barred as the state statute "is modeled on the federal Wiretap Act and covers interception of wire and electronic communications, not the acquisition of electronically stored communications and the disclosure of such communications as Plaintiffs have alleged." *Quon v. Arch Wireless Operating Co., Inc.,* 309 F.Supp.2d 1204, 1210 (C.D.Cal.2004). This being the law of the

case, the governmental defendants are **GRANTED** summary judgment on the section 629.86 claim brought against them by plaintiffs.

Accordingly, for the reasons stated above defendants' motion for summary judgment is **GRANTED IN PART** and **DENIED IN PART**, and plaintiffs' motion for partial summary judgment is **DENIED**.

Per the parties' stipulation and the Court's order entered on July 18, 2006, the Pretrial Conference in this case is scheduled for October 23, 2006, at 11:00 a.m., and trial is scheduled for November 7, 2006, at 9:00 a.m.

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JEFF QUON, JERILYN QUON, APRIL FLORIO, DOREEN KLEIN, STEVE TRUJILLO; and ROES 1 through 20, Inclusive Plaintiffs, v. ARCH WIRELESS INCORPORATED, a Delaware Corporation; CITY OF ONTARIO, A	CASE NO.: EDCV 03-0199 SGL (OPx) JUDGMENT (Filed Nov. 21, 2006)

Municipal Corporation; ONTARIO POLICE DEPARTMENT; LLOYD SCHARF, Individually and as Chief of Ontario Police Department; DEBBIE GLENN, Individually and as a Sergeant of Ontario Police Department; and DOES 1 through 10, Inclusive,

Defendants.

This matter came on regularly for trial on November 7, and 8, 2006, in Courtroom 1 of the United States District Court Central, the Honorable Stephen Larson, Judge presiding. The plaintiffs appeared by attorney Michael A. Morguess,; [sic] Defendants City of Ontario, Ontario Police Department and Lloyd Scharf appeared by attorneys D.C. Rinos and Laura Stephan of Rinos & Martin and Defendant Debbie Glenn appeared by Bruce E. Disenhouse of Kinkle, Rodiger & Spriggs.

A jury of eight persons was regularly empanelled and sworn. Witnesses were sworn and testified. Exhibits were admitted into evidence. After hearing the evidence and arguments of counsel, the jury was duly instructed by the Court and the cause was submitted to the jury. The jury duly deliberated and thereafter returned into Court with its verdict as follows:

We the jury in the above-entitled action find that Lloyd Scharf ordered the audit of Jeff Quon's text message pager:

A. To determine whether Jeff Quon was improperly using his text message pager for personal purposes; or

_____

B. To determine the efficacy of the existing character limits to ensure that officers were not being required to pay for work-related expenses.

__X_____

After making your factual finding by checking one of the lines, sign and date the verdict form.

DATE: November 8, 2006

CHRISTOPHER HERBERS
FOREPERSON

It appearing by reason of said verdict and this Court's amended order of August 15, 2006 that Defendants City Of [sic] Ontario, Ontario Police Department, Lloyd Scharf, and Debbie Glenn are entitled to judgment against Plaintiffs Jeff Quon, Jerilyn Quon, April Florio, Doreen Klein and Steve Trujillo, and it appearing by reason of this Court's amended order of August 15, 2006 that Defendant Arch Wireless Incorporated is entitled to judgment against Plaintiffs Jeff Quon, Jerilyn Quon, Steve Trujillo, Doreen Klein and April Florio,

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that Defendants CITY OF ONTARIO, ONTARIO POLICE DEPARTMENT, LLOYD SCHARF, DEBBIE GLENN and ARCH WIRELESS INCORPORATED shall have judgment against Plaintiffs JEFF QUON, JERILYN QUON, APRIL FLORIO, DOREEN KLEIN and STEVE TRUJILLO, that Plaintiffs shall take nothing by way of this suit, and Defendants shall recover costs of suit pursuant to 28 USC Section 1920.

DATED: 11-20-06

/s/ S G Larson
UNITED STATES
DISTRICT COURT JUDGE

STEPHEN G. LARSON
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
3470 Twelfth Street, Riverside, CA 92501
CIVIL MINUTES – GENERAL

Date: February 5, 2007

Case No. EDCV 03-00199-SGL(OPx)

Title: JEFF QUON, JERILYN QUON, APRIL FLORIO, DOREEN KLEIN, STEVE TRUJILLO, ROES 1-20, inclusive -*v*- ARCH WIRELESS INC., CITY OF ONTARIO, LLOYD SCHARF, DEBBIE GLENN, DOES 1-10, inclusive

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PRESENT: HONORABLE STEPHEN G. LARSON, UNITED STATES DISTRICT JUDGE

Jim Holmes Court Room Deputy Clerk	Theresa Lanza Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:	ATTORNEYS PRESENT FOR DEFENDANTS:
Michael A. Morguess	Laura L. Stephan Bruce Disenhouse John H. Horowitz

PROCEEDINGS: MINUTES RE: MOTION TO AMEND OR ALTER JUDGMENT MOTION FOR NEW TRIAL (filed 12-7-06)

The Court heard argument on plaintiff's motion to amend or alter judgment pursuant to FRCP 59(d)

and motion for new trail [sic] pursuant to FRCP 59(a). Both motions are DENIED.

With respect to the motion to amend or alter the judgment, the Court has fully reconsidered its amended order of August 15, 2006, and again confirms that it is correct. In arguing that the Court's earlier order should be set aside on the ground that the Court erred in ruling that defendant Arch Wireless acted is a remote computing service, as opposed to an electronic storage service, when it disclosed plaintiff's text messages, plaintiff mistakenly confuses the issue of what was or what was not contained in the *service contract* between the City of Ontario and Arch Wireless with the far more pertinent *legal description* of what constitutes a remote computing service, and the law related to that description, and how that law is applied to the facts of the particular storage activity provided to the City of Ontario by Arch Wireless. That is to say, the critical questions are what service (be it contracted for or not) did Arch Wireless in fact provide to the City of Ontario and whether that service is properly characterized under the law as being one of a remote computing service. For the reasons set forth in its earlier order, the Court finds that it is.

With respect to the motion for new trial, the Court does not find, after reviewing all of the evidence adduced at trial, that the verdict is contrary to the clear weight of the evidence, or that the verdict is

based upon evidence which is false, or that a new trial is necessary to prevent a miscarriage of justice.

IT IS SO ORDERED.

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554 F.3d 769

United States Court of Appeals,
Ninth Circuit.

Jerilyn QUON; April Florio; Jeff Quon; Steve Trujillo, Plaintiffs-Appellants,

v.

ARCH WIRELESS OPERATING COMPANY, INCORPORATED, a Delaware corporation; City of Ontario, a municipal corporation; Lloyd Scharf, individually and as Chief of Ontario Police Department; Ontario Police Department; Debbie Glenn, individually and as a Sergeant of Ontario Police Department, Defendants-Appellees.

No. 07-55282.

Jan. 27, 2009.

Zahra Khoury, Esquire, Michael A. McGill, Esquire, Lackie & Dammeier APC, Upland, CA, for Plaintiffs-Appellants.

Barry J. Blonien, Matthew A. Brill, Esquire, Partner, Latham & Watkins, LLP, Washington, DC, Kent J. Bullard, Greines Martin Stein & Richland, LLP, Los Angeles, CA, Dimitrios C. Rinos, Esquire, Rinos & Martin, Tustin, CA, Bruce E. Disenhouse, Kinkle Rodiger & Spriggs, Riverside, CA, for Defendants-Appellees.

Before: HARRY PREGERSON and KIM McLANE WARDLAW, Circuit Judges, and RONALD B. LEIGHTON,* District Judge.

Order; Concurrence by Judge WARDLAW; Dissent by Judge IKUTA.

ORDER

Judges Pregerson, Wardlaw, and Leighton voted to deny Appellees' petition for panel rehearing. Judges Pregerson and Wardlaw also voted to deny Appellees' petition for rehearing en banc, and Judge Leighton so recommended.

The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the non-recused active judges in favor of en banc reconsideration. Fed. R.App. P. 35. Judge Bybee was recused.

The petition for rehearing en banc is denied.

WARDLAW, Circuit Judge, concurring in the denial of rehearing en banc:

No poet ever interpreted nature as freely as Judge Ikuta interprets the record on this appeal. The dissent is not bound by the facts, even those found by

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* The Honorable Ronald B. Leighton, United States District Judge for the Western District of Washington, sitting by designation.

the jury; nor is it confined to the actual fact-driven Fourth Amendment holding. The dissent's lofty views of how the City of Ontario Police Department ("OPD") should have guided the use of its employees' pagers are far removed from the gritty operational reality at the OPD. I write only to correct the seriously flawed underpinnings of the dissent and to demonstrate that our opinion carefully and correctly applied the tests set forth in *O'Connor v. Ortega*, 480 U.S. 709, 107 S.Ct. 1492, 94 L.Ed.2d 714 (1987). That our opinion follows Supreme Court precedent and accords with our sister circuits is obviously why this appeal failed to win the support of a majority of our active judges for rehearing en banc.

I.

The dissent selectively recites facts to support its disagreement with the outcome of our panel's Fourth Amendment analysis. For a full recitation of the record evidence, read the opinion. *See Quon v. Arch Wireless Operating Co.*, 529 F.3d 892, 895-99 (9th Cir.2008). Set forth below are the key factual findings that the dissent either mischaracterizes or over-looks entirely.

The record belies the dissent's assertion that the OPD officers were permitted to use the pagers only during SWAT emergencies. Dissent at 774. Sergeant Jeff Quon ("Quon") and other SWAT team members, who were required to be on call "24/7," had been issued the pagers pursuant to an agreement with the

OPD. The agreement to provide the officers' pagers resulted from the OPD's "refusal to pay overtime or stand-by pay to officers who must be available for SWAT call-outs."

Moreover, the record is clear that the City had no official policy governing the use of the pagers. *Quon*, 529 F.3d at 896. At the time it contracted for the pagers, the City had in place a general "Computer Usage, Internet and E-mail Policy" (the "Policy"), which Quon had signed before the City even acquired the pagers. *Id.* However, the Policy does not expressly cover the pagers or text messaging. *Id.* According to Lieutenant Steve Duke ("Lt. Duke"), a Commander with the OPD Administration Bureau, Quon attended a 2002 meeting during which Lt. Duke allegedly informed those in attendance that the pager messages "were considered e-mail, and that those messages would fall under the City's policy as public information and eligible for auditing." *Id.* Quon "vaguely recalled attending" the meeting. *Id.* Yet, he did *not* recall Lt. Duke stating at the meeting that the use of the pagers was governed by the Policy – a fact the dissent fails even to mention. *See id.*

More troubling still is the dissent's failure to consider the OPD's informal – but express and specific – policy and practices that did govern the use of the pagers, or Lt. Duke's role in effecting this policy. By burying these key facts, the dissent again misrepresents the record. *See* Dissent at [774-75]. Lt. Duke, who was officially in charge of administering the use

of the pagers and procuring payment of overage charges, explained the informal policy as follows:

> "[T]he practice was, if there was overage, that the employee would pay for the overage that the City had. . . . [W]e would usually call the employee and say, 'Hey, look, you're over X amount of characters. It comes out to X amount of dollars. Can you write me a check for your overage[?]' "

Id. at 897 (alterations in original). Lt. Duke told Quon that it was "not his intent to audit employee's [sic] text messages to see if the overage is due to work related transmissions." *Id.* at 897 (alteration in original). According to Quon, Lt. Duke stated that "'if you don't want us to read [your messages], pay the overage fee.'" *Id.* As a result of his official position, Lt. Duke's statements carried "a great deal of weight," as the district court found. *Quon v. Arch Wireless Operating Co.*, 445 F.Supp.2d 1116, 1141 (C.D.Cal.2006). Because the record evidence showed that Lt. Duke was in charge of the distribution and use of the pagers, the district court and our panel concluded "it was reasonable for Quon to rely on the policy – formal or informal – that Lieutenant Duke established and enforced." *Quon*, 529 F.3d at 907.

The practices of the OPD were consistent with Quon's understanding of the informal policy. Quon exceeded the monthly character limit "three or four times" and paid the City for the overages. *Id.* at 897. Each time, "'Lieutenant Duke would come and tell [him] that [he] owed X amount of dollars because [he]

went over [his] allotted characters,'" and Quon would pay the City for the overages. *Id.* (alterations in original). The City did not review any of Quon's messages in any of these instances. *Id.* The informal policy remained in place until Lt. Duke suddenly let it be known that he was "tired of being a bill collector with guys going over the allotted amount of characters on their text pagers." *Id.* In response, Chief of Police Lloyd Scharf ordered Lt. Duke to "'request the transcripts of those pagers for auditing purposes.'" *Id.* at 897-98. Lt. Duke obtained and reviewed the transcripts of the messages sent and received by Quon, which revealed that Quon "'had exceeded his monthly allotted characters by 15,158 characters,' and that many of [the] messages were personal in nature and were often sexually explicit." *Id.* at 898.

The dissent also oversimplifies and misstates the procedural posture of the case. The parties filed numerous rounds of motions for summary judgment. *Id.* Ultimately, as to the Fourth Amendment claims, the district court found that, in light of the OPD's informal policy that the text messages would not be audited, Quon had a reasonable expectation of privacy in his messages. *Quon,* 445 F.Supp.2d at 1140-43. Our unanimous panel agreed. *Quon,* 529 F.3d at 906 ("We agree with the district court that the Department's informal policy that the text messages would not be audited if he paid the overages rendered Quon's expectation of privacy in those messages reasonable."). The dissent's suggestion that we reversed

the district court's holding as to Quon's reasonable expectation of privacy is untrue. Dissent at [775-76].

The dissent incomprehensibly ignores the jury portion of the trial as to the purpose of Chief Scharf's search of the pager transmissions. Denying summary judgment, the district court had ruled that a jury would decide "the actual *purpose* or *objective* Chief Scharf sought to achieve in having Lieutenant Duke perform the audit of Quon's pager." *Quon,* 445 F.Supp.2d at 1144. A jury trial was held, during which Chief Scharf testified that he asked Lt. Duke to audit "the top two [pagers] that were in excess of the 25,000 character [ ] [limit] to determine if [the OPD] needed to add more characters, or – if it was occurring on duty time, were the officers paying for the overages where the city should be, because it's certainly cheaper to add more characters than it is to pay for overages if it was occurring on duty time." By special verdict, the jury found that Chief Scharf's purpose was to "determine the efficacy of the existing character limits to ensure that officers were not being required to pay for work-related expenses." The jury expressly rejected the alternative possibility – that Chief Scharf's purpose was to uncover misconduct. *See Quon,* 529 F.3d at 899. The dissent's statement that Chief Scharf "sent the matter to internal affairs for an investigation 'to determine if someone was wasting . . . City time not doing work when they should be,'" Dissent at [775] (alteration in original), is directly contrary to Chief Scharf's testimony and the jury's factual finding, which was not even the subject

of an appeal by the City. The City, for reasons of its own, was quite content to have the jury find a legitimate purpose for Chief Scharf's search, and, as any first-year lawyer would agree, we are bound on appeal by the jury's factual determination.

II.

The dissent incorrectly asserts that the opinion "departs" from *O'Connor*, 480 U.S. 709, 107 S.Ct. 1492, 94 L.Ed.2d 714. *Id.* The opinion in fact adheres to *O'Connor*'s holding, explicitly acknowledging that "'[t]he operational realities of the workplace . . . may make *some* employees' expectations of privacy unreasonable,'" and that privacy "'may be reduced by virtue of actual office practices and procedures, or by legitimate regulation,'" *Quon*, 529 F.3d at 903-04 (alterations in original) (quoting *O'Connor*, 480 U.S. at 717, 107 S.Ct. 1492). However, our opinion – unlike the dissent – also recognizes that in *O'Connor*, the Supreme Court mandated a "'case-by-case'" approach to determining whether an employee has a reasonable expectation of privacy in the workplace. *Quon*, 529 F.3d at 904 (quoting *O'Connor*, 480 U.S. at 718, 107 S.Ct. 1492). Further, our opinion follows the Supreme Court's instruction that "'public employer intrusions on the constitutionally protected privacy interests of government employees . . . should be judged by the standard of reasonableness *under all the circumstances*.'" *Quon*, 529 F.3d at 904 (emphasis added) (quoting *O'Connor*, 480 U.S. at 725-26, 107

S.Ct. 1492). Thus, the analysis is necessarily fact-driven, and all the factual circumstances surrounding the search must be considered.

In affirming the district court's holding, we followed the Supreme Court's mandate to evaluate the "operational realities of the workplace." *O'Connor,* 480 U.S. at 717, 107 S.Ct. 1492. The dissent's suggestion to the contrary is simply due to its flawed description of the realities of the OPD workplace. By failing to consider all the circumstances of the issuance and use of the pagers for text messaging, the dissent perceives a conflict with *O'Connor* where none in fact exists.

The dissent's concerns regarding the California Public Records Act ("CPRA") similarly lack merit. *See* Cal. Gov't Code § 6253(a). The existence of the CPRA as a consideration is offset by the existence of the informal but express policy and practices governing the use of the pagers by the OPD officers. Moreover, as our panel (and the district court) note, there was "no evidence before the [c]ourt suggesting that CPRA requests to the department are so widespread or frequent as to constitute an open atmosphere so open to fellow employees or the public that no expectation of privacy is reasonable." *Quon,* 529 F.3d at 907 (alteration in original) (internal quotation marks omitted); *see Zaffuto v. City of Hammond,* 308 F.3d 485, 489 (5th Cir.2002) (holding that, notwithstanding the existence of the public records law, "[a] reasonable juror could conclude . . . that [the plaintiff] expected that his call to his wife would be private,

and that that expectation was objectively reasonable"); *see also Yin v. State of Cal.*, 95 F.3d 864, 871 (9th Cir.1996) ("Although there is little direct case law on point, obviously there are limitations on the state's ability to erode reasonable expectations of privacy by statutory enactments.").

III.

The dissent distorts our holding as to the scope of the search. We did not adopt a "less intrusive means" test. *See* Dissent at [774-75, 777-79]. The "less intrusive means" discussion relates to the jury's finding that Chief Scharf conducted the search for noninvestigatory purposes.

O'Connor provides the framework for evaluating the reasonableness of a search in this context, which the dissent does not dispute. *Id.* at [778]. Applying this framework, we first held that the search was reasonable "at its inception" because the officers conducted the search for the work-related purpose of ensuring that "officers were not being required to pay for work-related expenses," as the jury had found below. *Quon*, 529 F.3d at 908. We then turned to the second prong of the *O'Connor* test: determining whether the measures adopted were "reasonably related to the objectives of the search and not excessively intrusive in light of . . . the nature of the [misconduct]." 480 U.S. at 726, 107 S.Ct. 1492 (internal quotation marks omitted). Because "the Department opted to review the contents of all the messages, work-related and

personal, without the consent of Quon," we held that the search "was excessively intrusive in light of the noninvestigatory object of the search." *Quon,* 529 F.3d at 909. This holding was also based on our conclusion that Quon's "reasonable expectation of privacy in those messages" was not outweighed by the government's interest – again, as found by the jury – in auditing the messages. *Id.*

The dissent incorrectly represents that we held that the search was unreasonable "*because* the city could have used less intrusive means to accomplish the objectives of the search." Dissent at [777] (emphasis added). Although we cited *Schowengerdt v. General Dynamics Corp.,* 823 F.2d 1328, 1336 (9th Cir.1987), we did not apply a "less intrusive means" test.[1] *Quon,* 529 F.3d at 908-09; *cf.* Dissent at 777-78 (conceding that "the panel does not explicitly state it is applying a least restrictive means test"). We mentioned other ways the OPD could have verified the efficacy of the 25,000-character limit merely to illustrate our conclusion that the search was "excessively intrusive" under *O'Connor,* when measured against the purpose of the search as found by the jury. *Quon,* 529 F.3d at 909. Moreover, the dissent's conclusion that we improperly analyzed the scope of the search is dependent upon its faulty conclusion that Quon

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[1] In fact, we only considered *Schowengerdt* to the extent necessary to consider the district court's decision. *See Quon,* 445 F.Supp.2d at 1145-46.

had a diminished or nonexistent expectation of privacy in the messages. *See* Dissent at [776, 779].

Our analysis is in no way inconsistent with the cases cited by the dissent. *See* Dissent at [776, 779]. The cases in which the Supreme Court has cautioned against employing a "least intrusive means" test have often involved circumstances in which the government had engaged in "years of investigation and study" that resulted in "reasonable conclusions" that the government conduct was necessary. *Skinner v. Ry. Labor Executives' Ass'n,* 489 U.S. 602, 629 n. 9, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989). By contrast, Chief Scharf impulsively ordered the search of Quon's messages without so much as pausing to consider other ways to accomplish his stated goal of determining the efficacy of the numeric character limit. *See Quon,* 529 F.3d at 908-09. Moreover, unlike in the cases cited by the dissent, *see* Dissent at [774-75, 777-79], this case did *not* involve a "special needs" search. In any event, because we did not use a "least intrusive means" test, there is no conflict with either the Supreme Court or our sister circuits.

IV.

The dissent's conclusion that our panel's decision is "contrary to 'the dictates of reason and common sense' as well as the dictates of the Supreme Court," Dissent at [779], is based on its loose recitation of "facts," untethered from the record evidence or jury findings. It is the dissent – rather than our opinion –

that is at odds with *O'Connor* and the "operational realities" of the OPD. By stripping public employees of all rights to privacy regardless of the *actual* operational realities of each workplace, the dissent would have us create a far broader rule than Supreme Court precedent allows. The majority of our court properly rejected the dissenting judges' efforts to do so.

IKUTA, Circuit Judge, dissenting from the denial of rehearing en banc, joined by O'SCANNLAIN, KLEINFELD, TALLMAN, CALLAHAN, BEA, and N.R. SMITH, Circuit Judges:

The Ninth Circuit holds that a city police department violated the Fourth Amendment because it audited the messages sent from and received on its SWAT pagers to find out why the department was exceeding its contract with its text message service provider. According to the panel, the police department's failure to use a less intrusive search method violated a SWAT team member's Fourth Amendment rights: "if less intrusive methods were feasible, or if the depth of the inquiry or extent of the seizure exceeded that necessary for the government's legitimate purposes, the search would be unreasonable." *Quon v. Arch Wireless Operating Co.*, 529 F.3d 892, 908-09 (2008) (alterations omitted).

There are two problems with this conclusion: First, in ruling that the SWAT team members had a reasonable expectation of privacy in the messages sent from and received on pagers provided to officers

for use during SWAT emergencies, the panel undermines the standard established by the Supreme Court in *O'Connor v. Ortega,* 480 U.S. 709, 107 S.Ct. 1492, 94 L.Ed.2d 714 (1987), to evaluate the legitimacy of non-investigatory searches in the workplace. In doing so, the panel improperly hobbles government employers from managing their workforces. Second, the method used by the panel to determine whether the search was reasonable conflicts with binding Supreme Court precedent, in which the Court has repeatedly held that the Fourth Amendment does not require the government to use the "least intrusive means" when conducting a "special needs" search. *See Bd. of Educ. of Independent Sch. Dist. No. 92 of Pottawatomie County v. Earls,* 536 U.S. 822, 837, 122 S.Ct. 2559, 153 L.Ed.2d 735 (2002); *Vernonia Sch. Dist. 47J v. Acton,* 515 U.S. 646, 663, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995); *Skinner v. Ry. Labor Executives' Ass'n,* 489 U.S. 602, 629 n. 9, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989). The panel's decision to adopt a less intrusive means test conflicts not only with Supreme Court case law, but also with the decisions of seven of our sister circuits.

Because the panel's decision adopts a standard that makes it exceptionally difficult for public employers to go about the business of running government offices, and in doing so conflicts with Supreme Court precedent and the decisions of seven other circuits, I must dissent from the denial of rehearing en banc.

I

The Ontario Police Department obtained two-way pagers for its SWAT team members to enable better coordination, and more rapid and effective responses to emergencies. The SWAT team members were told orally and in writing that under the city's applicable policy, the text messages, including any personal messages, were subject to auditing and were not private.

Under the terms of the city's contract with its service provider, each pager could send and receive 25,000 characters at a flat rate; after that, the pagers incurred overage charges on a per-character basis. *Quon,* 529 F.3d at 897. During the first eight months the pagers were in use, a number of SWAT team members went over the 25,000 character allotment. One of the SWAT team members who exceeded the number of characters was Sergeant Jeffrey Quon. Unbeknownst to the department, Quon was using his pager to send and receive both personal and sexually explicit text messages. *Id.* at 898.

After reviewing one or two rounds of bills for the pagers, Lieutenant Steve Duke (who was in charge of providing and accounting for the pagers) met with Quon about the overages. *Quon v. Arch Wireless Operating Co.,* 445 F.Supp.2d 1116, 1124 (C.D.Cal.2006). Duke informed Quon that the text messages were considered emails and subject to the city's computer usage policy, which allowed the department to audit the pages. *Quon,* 529 F.3d at 897.

Quon, as a member of the police department and a city employee, had previously received a copy of the city's computer usage policy and had signed a form acknowledging that he had reviewed and understood the policy. *Id.* at 896. Duke told Quon that, in order to "streamlin[e] administration and oversight over the use of the pagers," *Quon,* 445 F.Supp.2d. at 1125, if a SWAT team member paid all overage charges, Duke would not audit the text messages to determine if the team member's overage was due to business or personal use, but Duke also told Quon he "needed to cut down on his transmissions." *Quon,* 529 F.3d at 897. In April 2002, Quon was present at the supervisory staff meeting when Lieutenant Duke reiterated that the text messages sent from and received on the SWAT pagers were subject to the city's usage policy and could be audited. Quon later received a memorandum from the Chief of Police stating: "Reminder that two-way pagers are considered email messages. This means that messages would fall under the City's policy as public information and eligible for auditing."

In August 2002, less than four months after this meeting, and after the pagers had been in use for only eight months, Lieutenant Duke made it known that "he had grown 'tired of being a bill collector with guys going over the allotted amount of characters on their text pagers.'" *Quon,* 445 F.Supp.2d. at 1125. In response, the Chief of Police ordered an audit of the text messages to determine whether the police department's contract with their service provider was

sufficient to meet its needs for text messaging. *Quon*, 529 F.3d at 897-98.

Upon examination of the transcripts, it was clear that Quon was using the pager for more than the "light" personal use allowed under the city's policy. Of the more than 450 texts he sent while on duty in a single month, only 57 of them were for business purposes. The remainder were personal. The Chief of Police sent the matter to internal affairs for an investigation "to determine if someone was wasting . . . City time not doing work when they should be." Quon (as well as his wife and friends) filed suit, alleging that the police department and individual officers had violated their Fourth Amendment rights by reviewing the transcripts of the text messages sent to and from Quon's SWAT pager.

II

The panel reversed the district court's dismissal of the Fourth Amendment claims based on two untenable conclusions: First, the panel concluded that Quon had a reasonable expectation of privacy in the text messages sent from and received on his SWAT pager. Second, building on this erroneous conclusion, the panel concluded that the police department's search was not reasonable in scope because there were less intrusive ways the police department could have determined whether the contract with its service provider was sufficient to meet its paging needs.

A

The panel departs from *O'Connor v. Ortega* in concluding that Quon's reasonable expectation of privacy in the text messages sent from and received on his SWAT pager was undiminished by the written policy or the needs of a police department managing a SWAT team. *O'Connor* mandates a practical approach to evaluating a public employer's searches of government offices and equipment. It requires us to consider the "operational realities of the workplace" when determining whether an expectation of privacy is reasonable. 480 U.S. at 717, 107 S.Ct. 1492.

Under *O'Connor,* a public employer may conduct searches of employees subject only to a standard of reasonableness "under all the circumstances." *Id.* at 725-26, 107 S.Ct. 1492; *accord Vernonia,* 515 U.S. at 665, 115 S.Ct. 2386. Although "[i]ndividuals do not lose Fourth Amendment rights merely because they work for the government instead of a private employer[, t]he operational realities of the workplace . . . may make some public employees' expectations of privacy unreasonable," and an employee's expectation of privacy "may be reduced by virtue of actual office practices and procedures, or by legitimate regulation." *O'Connor,* 480 U.S. at 717, 107 S.Ct. 1492 (emphasis omitted).

These principles establish that Quon's expectation of privacy in the text messages he sent and received on his SWAT pager was either significantly diminished or non-existent. Quon was aware of the

city's written policy mandating that even personal messages are subject to "access and disclosure." This official policy was reinforced by the "operational realities" of this particular workplace. Quon was using a SWAT pager, issued to him as a member of the SWAT team to facilitate the police department's goal of "enabl[ing] better coordination and a more rapid and effective response to emergencies by providing nearly instantaneous situational awareness to the team as to the other members['] whereabouts." *Quon,* 445 F.Supp.2d at 1123. Given that the pagers were issued for use in SWAT activities, which by their nature are highly charged, highly visible situations, it is unreasonable to expect that messages sent on pagers provided for communication among SWAT team members during those emergencies would not be subsequently reviewed by an investigating board, subjected to discovery in litigation arising from the incidents, or requested by the media.

Moreover, messages sent from and received by the SWAT pagers may be subject to the California Public Records Act, which makes most police records accessible to the public and requires police departments to review and disclose an exceptionally wide range of public records. Under this act, "[p]ublic records are open to inspection by the public at all times during the office hours of the state or local agency and every person has a right to inspect any public record," except under specified circumstances. Cal. Gov't Code § 6253(a). Government employees in California are well aware that every government

record is potentially discoverable at the mere request of a member of the public, and their reasonable expectation of privacy in such public records is accordingly reduced. As noted in *O'Connor,* where the public has access to a government workplace, it may be that "no expectation of privacy is reasonable." 480 U.S. at 717-18, 107 S.Ct. 1492.

In light of these operational realities, a police officer could not reasonably expect to keep communications over a SWAT pager confidential. Rather, Quon could have avoided exposure of his sexually explicit text messages simply by using his own cell phone or pager. *See O'Connor,* 480 U.S. at 725, 107 S.Ct. 1492 (noting that a government employee "may avoid exposing personal belongings at work by simply leaving them at home"); *see also Katz v. United States,* 389 U.S. 347, 351, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) ("What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.").

Under these circumstances, balancing whatever remained of Quon's expectation of privacy with the police department's need to manage its SWAT pagers, the police department's search was "justified at its inception" and "was reasonably related in scope to the circumstances which justified the interference in the first place." *O'Connor,* 480 U.S. at 726, 107 S.Ct. 1492. The panel's conclusion to the contrary, based solely on the informal statement of Lieutenant Duke that he personally would not audit the pagers if the SWAT team members agreed to pay for any overages,

departs from the practical approach of *O'Connor* and effectively precludes a public employer from undertaking investigations reasonably necessary to conduct its business.

B

As troubling as this misreading of *O'Connor* is the panel's conclusion that in light of Quon's reasonable expectation of privacy, the scope of the police department's search was unreasonable. To reach this conclusion, the panel quotes *Schowengerdt v. Gen. Dynamics Corp.* for the principle that "[i]f less intrusive methods were feasible, or if the depth of the inquiry or extent of the seizure exceeded that necessary for the government's legitimate purposes, such as its interest in security, the search would be unreasonable and [the employee's] Fourth Amendment rights . . . would have been violated." 823 F.2d 1328, 1336 (9th Cir.1987) (footnotes omitted). Relying on this language, the panel rejected the district court's determination "that there were no less-intrusive means" to determine whether the 25,000-character limit was sufficient and concluded that the scope of the search was unreasonable. According to the panel, because the city could have used other less intrusive means to accomplish the objectives of the search, the city violated Quon's Fourth Amendment rights. *Quon*, 529 F.3d at 908-09.

The panel's reliance on *Schowengerdt* is misplaced. The quoted language from that case has been

superceded not once, but three times by subsequent Supreme Court opinions. The Court stated in *Skinner* that "[t]he reasonableness of any particular government activity does not necessarily or invariably turn on the existence of alternative 'less intrusive' means." 489 U.S. at 629 n. 9, 109 S.Ct. 1402 (internal quotation marks omitted). Again the Court stated in *Vernonia,* "[w]e have repeatedly refused to declare that only the 'least intrusive' search practicable can be reasonable under the Fourth Amendment." 515 U.S. at 663, 115 S.Ct. 2386. Finally, for a third time, with some frustration, the Court reiterated in *Earls* that "this Court has repeatedly stated that reasonableness under the Fourth Amendment does not require employing the least intrusive means." 536 U.S. at 837, 122 S.Ct. 2559. The Supreme Court has repeatedly rejected a "least intrusive means" analysis for purposes of determining the reasonableness of a search in a "special needs" context.

And yet the panel does exactly what the Supreme Court has precluded. Although the panel does not explicitly state it is applying a least restrictive means test, it does just that. Rather than evaluate whether the search "*actually* conducted" by the police department was "reasonably related to the objectives of the search and not excessively intrusive in light of [its purpose]," as *O'Connor* requires us to do, 480 U.S. at 726, 107 S.Ct. 1492 (emphasis added), the panel looks at what the police department *could* have done. As the panel explains, "[t]here were a host of simple ways to verify the efficacy of the 25,000 character

limit . . . without intruding on Appellants' Fourth Amendment rights." *Quon*, 529 F.3d at 909. The panel then proposes other means of verifying the number of personal pages sent:

> For example, the police department could have warned Quon that for the month of September he was forbidden from using his pager for personal communications, and that the contents of all of his messages would be reviewed to ensure the pager was used only for work-related purposes during that time frame. Alternatively, if the Department wanted to review past usage, it could have asked Quon to count the characters himself, or asked him to redact personal messages and grant permission to the Department to review the redacted transcript. Under this process, Quon would have an incentive to be truthful because he may have previously paid for work-related overages and presumably would want the limit increased to avoid paying for such overages in the future. These are just a few of the ways in which the Department could have conducted a search that was reasonable in scope.

Id.

Because the panel could come up with a "host of simple ways" that would be less intrusive, it concluded that the police department's search was excessively intrusive and therefore violated Quon's Fourth Amendment rights. *Id.* This is the essence of the

"least intrusive means" test, which the Supreme Court has expressly rejected. Indeed, the panel's approach fits squarely within the Supreme Court's explanation of why the least intrusive means test is *not* appropriate: "[i]t is obvious that the logic of . . . elaborate less-restrictive-alternative arguments could raise insuperable barriers to the exercise of virtually all search-and-seizure powers, because judges engaged in *post hoc* evaluations of government conduct can almost always imagine some alternative means by which the objectives of the government might have been accomplished." *Skinner,* 489 U.S. at 629 n. 9, 109 S.Ct. 1402 (internal quotation marks, alterations, and citations omitted); *accord Earls,* 536 U.S. at 837, 122 S.Ct. 2559. The Ninth Circuit has similarly held that it is improper to apply the "least restrictive means" test in the context of a "special needs" search. *See Yin v. California,* 95 F.3d 864, 870 (9th Cir.1996) ("Under the balancing test, the Court determines if a search is reasonable by weighing the privacy interests of the individual against the government's interest in the search . . . the government does not have to use the least restrictive means to further its interests.").

Seven other circuits have followed the Supreme Court's instruction and explicitly rejected a less intrusive means inquiry in the Fourth Amendment context. *See Davenport v. Causey,* 521 F.3d 544, 552 (6th Cir.2008) ("Also irrelevant, despite plaintiffs' argument to the contrary, is whether or not the officer had other means of force at his disposal. The Fourth

Amendment does not require officers to use the best technique available as long as their method is reasonable under the circumstances." (internal quotation marks and alterations omitted)); *Lockhart-Bembery v. Sauro,* 498 F.3d 69, 76 (1st Cir.2007) ("To the extent Lockhart-Bembery argues that Sauro acted unreasonably [under the Fourth Amendment] because there were other, less intrusive ways to reduce the safety hazard, that argument fails as a matter of law. There is no requirement that officers must select the least intrusive means of fulfilling community caretaking responsibilities." (footnote omitted)); *Cassidy v. Chertoff,* 471 F.3d 67, 79 (2d Cir.2006) ("The Supreme Court has repeatedly stated that reasonableness under the Fourth Amendment does not require employing the least intrusive means to accomplish the government's ends." (internal quotation marks omitted)); *Shell v. United States,* 448 F.3d 951, 956 (7th Cir.2006) ("As an initial matter, we note that a search does not need to be the least intrusive alternative to be constitutionally valid, it simply has to be reasonable."); *United States v. Prevo,* 435 F.3d 1343, 1348 (11th Cir.2006) ("Suffice it to say that the Fourth Amendment does not require the least intrusive alternative; it only requires a reasonable alternative."); *Shade v. City of Farmington,* 309 F.3d 1054, 1061 (8th Cir.2002) ("The Fourth Amendment does not require officers to use the least intrusive or less intrusive means to effectuate a search but instead permits a range of objectively reasonable conduct."); *United States v. Melendez-Garcia,* 28 F.3d 1046, 1052 (10th Cir.1994) (stating that the Fourth Amendment

does not require police "to use the least intrusive means in the course of a [*Terry*] detention, only reasonable ones").

By reintroducing the least-intrusive means test into our Fourth Amendment jurisprudence, the panel departs from Supreme Court precedent and from the decisions of seven of our sister circuits, and reaches the untenable conclusion that the police department acted unreasonably in auditing messages sent and received on a SWAT pager, provided to SWAT members to facilitate communications during emergencies.

III

This case is, at its core, a workplace privacy case. The panel turns its back on "the common-sense realization that government offices could not function if every employment decision became a constitutional matter." *O'Connor,* 480 U.S. at 722, 107 S.Ct. 1492 (quoting *Connick v. Myers,* 461 U.S. 138, 143, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983)). By holding that a SWAT team member has a reasonable expectation of privacy in the messages sent to and from his SWAT pager, despite an employer's express warnings to the contrary and "operational realities of the workplace" that suggest otherwise, and by requiring a government employer to demonstrate that there are no more less intrusive means available to determine whether its wireless contract was sufficient to meet its needs, the panel's decision is contrary to "the dictates of reason and common sense" as well as the dictates of

the Supreme Court. The panel's decision undercuts the Supreme Court's consistent and explicit prohibition on reading a less intrusive means requirement into the Fourth Amendment's prohibition on unreasonable searches. It also undermines the reasoning and logic of *O'Connor v. Ortega*. I respectfully dissent from our denial of rehearing en banc.

CITY OF ONTARIO, CALIFORNIA ADMINISTRATIVE MANUAL	DATE: December 20, 1999
SUBJECT: Computer Usage, Internet and E-Mail Policy	A.M. NUMBER I-7-4
APPLICABLE TO: All Employees	ISSUED BY: /s/ Gregory C. Devereaux Gregory C. Devereaux City Manager

I. PURPOSE

To establish a uniform policy and procedures for the use of City computers and networks, access to the Internet and use of electronic mail (e-mail). These resources allow the City of Ontario staff to record and secure critical information, conduct business in an efficient manner, effectively communicate with other organizations, and promote the interests of the City. The improper use of these tools can undermine the confidence citizens have in the City and its staff. Failure to adhere to this policy will be viewed as extremely serious and shall be subject to appropriate disciplinary action.

II. POLICY

The use of City-owned computers and all associated equipment, software, programs, networks,

Internet, e-mail and other systems operating on these computers is limited to City of Ontario related business. The use of these tools for personal benefit is a significant violation of City of Ontario Policy.

III. GENERAL PROVISIONS

A. The use of any City-owned computer equipment, computer peripherals, City networks, the Internet, e-mail services or other City computer related services for personal benefit or entertainment is prohibited, with the exception of "light personal communications" as noted in Provision F of this policy.

B. The use of the Internet is restricted to City of Ontario related business. Access to Internet sites for personal use is a significant violation of City policy and as such will be subject to appropriate disciplinary action. Information regarding Internet sites accessed by employees may be considered "public information." Internet sites related to shopping, entertainment, sexual issues, and personal hobbies are a few examples of inappropriate sites.

C. Access to all sites on the Internet is recorded and will be periodically reviewed by the City. The City of Ontario reserves the right to monitor and log all network activity including e-mail and Internet use, with or without notice. Users should have no expectation of privacy or confidentiality when using these resources.

D. Access to the Internet and the e-mail system is not confidential; and information produced either in hard copy or in electronic form is considered City property. As such, these systems should not be used for personal or confidential communications. Deletion of e-mail or other electronic information may not fully delete the information from the system.

E. The use of inappropriate, derogatory, obscene, suggestive, defamatory, or harassing language in the e-mail system will not be tolerated.

F. The use of e-mail for advertising of personal items or services, political discussion or material, or religious material is prohibited. Some incidental and occasional personal use of the e-mail system is permitted if limited to "light" personal communications. Light personal communications may consist of personal greetings or personal meeting arrangements. In the event of a dispute as to what constitutes "light" personal greetings, the Agency Head or Department Director will determine if a specific e-mail fits the criteria of "light" personal communications. These messages are also subject to "access and disclosure" in the legal system and the media.

G. Employees are required to keep their passwords confidential to both other staff as well as other outside contacts.

H. When using the internet or e-mail, extreme care must be exercised by staff when downloading mail or documents. These documents should be scanned for possible viruses. Reports of e-mal [sic] viruses are becoming more common, and they could have a disastrous effect on your computer or the network. **[N]ever open any unsolicited e-mail. Never open an e-mail attachment if it is unexpected even from a "trusted" source.** If you have any questions, contact the Information Services Help Desk at extension 4499 or helpdesk@ci.ontario.ca.us.

IV. RETENTION OF E-MAIL

All data associated with the operation of the e-mail software, including contacts, calendars, tasks, journals, notes, and e-mail will be retained on normal daily data backups for a period of 60 days. After 60 days, this material will no longer be available from backup tapes. Staff is encouraged to delete e-mail in their inbox which is 60 days or older. E-mail deleted by staff will continue to be available in "deleted items" file for an additional 30 days before the system will automatically delete this information. If an e-mail message can be considered an Official City Record and covered by retention standards as defined by the City Clerk, this e-mail should be printed in hard copy, filed with associated material, and retained per City's established Records Retention Schedules.

V. ACKNOWLEDGEMENT FORM

Contained in this policy statement is an "Employee Acknowledgement" form which must be signed by each employee who uses computer equipment, and/or has access to the Internet or to an e-mail account. The "Employee Acknowledgement" form confirms that the employee has read and understands the City's policy. **Failure to have an executed form on file with the City will result in revocation of computer use, Internet access and e-mail access.**

VI. ADMINISTRATION

The Information Services Department is responsible for the administration, interpretation and application of this policy.

Computer Usage, Internet and E-mail Policy
Employee Acknowledgment

The use of City owned computers and related equipment, e-mail and the Internet are designed to enhance the ability of the staff to perform City business in a professional manner and to allow an improved level of communication to other business, government and development organizations. Improper use of these services, as defined in the "Computer Usage, Internet and E-mail Policy" violates the community's trust and will result in disciplinary action.

The City of Ontario reserves the right to monitor and log all network activity including e-mail and Internet use, with or without notice. Users should have no expectation of privacy or confidentiality when using these resources. The City will periodically monitor e-mail, Internet use, and computer usage for compliance with the policy.

I, Jeff Quon have read and fully
(Print/type Employee Name)

understand the City of Ontario's Computer Usage, Internet and E-mail Policy. I acknowledge that failure to adhere to this policy may result in disciplinary action.

/s/ Jeff Quon — 3-18-00
Employee Signature — Date

/s/ Lloyd Scharf — _____
Agency/Department Head Signature — Date

Computer Usage, Internet and E-mail Policy
Employee Acknowledgment

The use of City owned computers and related equipment, e-mail and the Internet are designed to enhance the ability of the staff to perform City business in a professional manner and to allow an improved level of communication to other business, government and development organizations. Improper use of these services, as defined in the "Computer Usage, Internet and E-mail Policy" violates the community's trust and will result in disciplinary action.

The City of Ontario reserves the right to monitor and log all network activity including e-mail and Internet use, with or without notice. Users should have no expectation of privacy or confidentiality when using these resources. The City will periodically monitor e-mail, Internet use, and computer usage for compliance with the policy.

I, STEVEN TRUJILLO have read and fully
(Print/type Employee Name)

understand the City of Ontario's Computer Usage, Internet and E-mail Policy. I acknowledge that failure to adhere to this policy may result in disciplinary action.

/s/ Steven Trujillo, SGT. 1/10/00
Employee Signature Date

/s/ Lloyd Scharf
Agency/ Department Head Signature Date

App. 158

07-55282

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JERILYN QUON; APRIL FLORIO;
JEFF QUON; STEVEN TRUJILLO,
Plaintiffs-Appellants,

v.

ARCH WIRELESS, INCORPORATED;
CITY OF ONTARIO; LLOYD SCHARF;
ONTARIO POLICE DEPARTMENT;
DEBBIE GLENN, Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA

AMICUS CURIAE BRIEF BY THE UNITED STATES IN SUPPORT OF THE PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC OF CITY OF ONTARIO, ONTARIO POLICE DEPARTMENT, AND LLOYD SCHARF

MICHAEL DUBOSE
Chief, Computer Crime and
Intellectual Property Section

RICHARD W. DOWNING
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INTEREST OF THE UNITED STATES

The panel found a reasonable expectation of privacy in certain text messages sent to and from a public employee's work pager, thus triggering Fourth Amendment requirements, even though the public employer had a formal "no confidentiality" policy. The United States has a strong law enforcement interest in the proper interpretation of the Fourth Amendment because an unduly expansive reading would hinder the government's ability to investigate crimes and in this case might cast doubt on the legality of portions of the Electronic Communications Privacy Act, 18 U.S.C. §§ 2701 *et seq.*

In addition, the United States has a substantial interest in the panel's ruling because the United States is a public employer that extensively uses "no confidentiality" policies with respect to the workplace and work-issued equipment to prevent abuse and

promote the public's safety and security. This brief is submitted pursuant to 9th Cir. R. 29-2.

ARGUMENT

I. THE PANEL ERRED BY CATEGORICALLY STATING THAT ALL USERS OF TEXT MESSAGING HAVE A REASONABLE EXPECTATION THAT THEIR MESSAGES ARE PRIVATE

The panel reasoned that because text messages convey "content," those who send and receive them in general have a reasonable expectation that the messages are private. This ruling was erroroneous [sic] because it made categorical conclusions about entire modes of communication without considering all relevant circumstances. Notably, the Sixth Circuit, en banc, recently rejected a similarly sweeping categorical conclusion about the privacy of e-mail. *See Warshak v. United States*, No. 06-4092, 2008 WL 2698177, at *5 (6th Cir. July 11, 2008) (en banc) ("Better, we think, to decide the validity of the statute in the context of a specific internet-service agreement and a specific search and seizure.").

This error raises a question of exceptional importance because it casts confusion over whether law enforcement may continue to obtain evidence from online service providers without a warrant—as Congress has authorized. The Electronic Communications Privacy Act ("ECPA") empowers law enforcement to obtain copies of stored communications (such

as the text messages here). *See* 18 U.S.C. § 2703(a) & (b). Law enforcement may compel providers to produce that evidence through several means, only some of which involve a search warrant. *Id.* § 2703(b). In addition, ECPA allows providers to turn over evidence voluntarily in some circumstances, also without a warrant. *See* 18 U.S.C. § 2702(b). The panel's suggestion that all persons who send or receive communications have a reasonable expectation that their content will remain private throws both parts of the statutory regime into confusion.

The panel broadly stated that "users do have a reasonable expectation of privacy in the content of their text messages vis-a-vis the service provider," and suggested there was "no meaningful difference" between text messages and e-mail—a technology immaterial to this case. Slip op. at 7020. This Fourth Amendment holding rests on an assumed analogy. Relying on what it called the "outside-of-envelope" rationale, the panel reasoned that the "content" of messages is private, while non-content information such as addresses and phone numbers is not. *Id.* To support this argument, the panel pointed to *Katz v. United States*, 389 U.S. 347 (1967), which involved a secret microphone above a telephone booth, and to cases holding that sealed letters and packages sent through the postal service are private. Applying these cases, the panel concluded that the text messages were private because they, too, conveyed "content." Slip op. at 7018-20. Though the panel stated that it did "not endorse a monolithic view of text message

users' reasonable expectation of privacy, as this is necessarily a context-sensitive inquiry," the panel discussed few contextual facts other than whether Quon "voluntarily permitted the Department to review his text messages." *Id.* at 7021.

The Fourth Amendment protects privacy in communications to the same extent that it protects privacy in anything else. If an individual communicates in a manner that demonstrates an "individual has shown that 'he seeks to preserve [something] as private,'" and society recognizes that expectation as reasonable, then the Fourth Amendment protects the communication's privacy. *Smith v. Maryland*, 442 U.S. 735, 740 (1979). Some communications meet this standard, while others do not. For example, although *Katz* recognizes a reasonable expectation of privacy in telephone conversations, this Court had no difficulty finding that someone who uses an old cordless telephone overheard with a radio "cannot be said to have had an objectively reasonable expectation of privacy in those communications" because "they were readily susceptible to interception." *Price v. Turner*, 260 F.3d 1144, 1148 (9th Cir. 2001) (Schroeder, C.J.). What mattered in *Price* was not *whether* content was transmitted, but *how* it was transmitted. *See also Johnson v. Hawe*, 388 F.3d 676, 684 (9th Cir. 2004) (finding "no reasonable expectation of privacy in communications over police dispatch radio" because "by virtue of their transmission" they are public).

The privacy of mail also turns on specifics. Only what a postal customer conceals behind an envelope

is private; anything else, such as the contents of postcards and unsealed magazines, may be read without a warrant. *See United States v. Choate*, 576 F.2d 165, 174 (9th Cir. 1978) (upholding the use of a mail cover without a warrant); *id.* at 203 n.73 (Hufstedler, J., concurring and dissenting) ("postal inspectors could photocopy messages on postcards and the contents of any 2nd-4th class mail, permitting law enforcement agencies to read personal communications"); 39 C.F.R. § 233.3(c)(2) (noting a mail cover may involve copying "the image of the outside cover, envelope, wrapper, *or contents* of any class of mail" (emphasis added)). Even the privacy of a face-to-face conversation in a private home depends on context: if someone in the room is a government informant wearing a microphone, the Fourth Amendment permits warrantless listening. *See United States v. White*, 401 U.S. 745, 749-50 (1971) (plurality opinion).

Content, then, receives no special treatment from the Fourth Amendment. Some content (such as the telephone conversation in *Katz* or a sealed letter) is protected by the Fourth Amendment, and some content (such as the cordless telephone conversations in *Price* or sky writing) is not. As with any Fourth Amendment question, the answer "can only be decided in the concrete factual context of the individual case." *Sibron v. New York*, 392 U.S. 40, 59 (1968). The analysis turns on all circumstances surrounding the communication, not just whether the communication includes content. Although it is clear that all "non-content" (such as e-mail addresses and phone

numbers) is not private, *see United States v. Forrester*, 512 F.3d 500, 510 (9th Cir. 2008), it would be a logical fallacy to conclude that the obverse—all content is private—must be true.

Here, plaintiffs communicated in a way that was not calculated to keep their messages private. Unlike sealed letters or spoken words, which ordinarily are transmitted from speaker to listener without any intermediate storage, the text messaging system the plaintiffs used necessarily involved placing their messages in the physical control of a third party, Arch Wireless. *See* slip op. at 7002-03. Courts have held that third-party access to information and records, without more, disposes of an expectation of privacy. *See Smith*, 442 U.S. at 743-44 ("a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties"); *United States v. Miller*, 425 U.S. 435, 443 (1976) ("[t]his Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities"); *United States v. Perrine*, 518 F.3d 1196, 1204 (10th Cir. 2008) ("[e]very federal court to address this issue has held that subscriber information provided to an internet provider is not protected by the Fourth Amendment's privacy expectation"); *Commonwealth v. Cote*, 556 N.E.2d 45, 49-50 (Mass. 1990) (applying *Miller* to conclude that telephone messages left with an answering service were not protected by the Fourth Amendment). Other than *Cote*, these cases did not involve the

content of communications. However, even if third-party access to written communications is not dispositive in itself, it is relevant to the *reasonableness* of the expectation of privacy.

It is also significant that plaintiffs used a mode a communication that automatically creates a written record. As the District Court of Nevada wrote in finding that there was no reasonable expectation of privacy in text messages sent through a police department paging system, "all messages are recorded and stored not because anyone is 'tapping' the system, but simply because that's how the system works." *Bohach v. City of Reno*, 932 F.Supp. 1232, 1234 (D. Nev. 1996). While a word spoken over the phone leaves no lasting record (absent a wiretap), a word written in a text message is inherently reduced to a permanent, and hence less private, format. *Cf. Katz*, 389 U.S. at 353 (identifying the "listening to *and recording* [of] the petitioner's words" as the improper "search and seizure" (emphasis added)). Unlike letters enclosed in envelopes, text messages have no barrier indicating that their sender wished to keep them private. *See Bond v. United States*, 529 U.S. 334, 338 (2000) (use of an "opaque bag" suggested privacy). While an envelope objectively demonstrates an intent to shield a letter from prying eyes, text messages are more akin to postcards because the provider can see their contents. *See* slip op. at 7002-03.

All this is particularly relevant when the third-party provider has a published policy about whether

and when it will access and disclose written messages. For example, Microsoft's Hotmail service warns users that Microsoft may disclose their e-mail if "necessary to protect the personal safety of Microsoft employees, customers or the public." *Microsoft Online Privacy Statement*, http://xrl.us/okn8r. Google's free Gmail e-mail service comes with terms that the Sixth Circuit characterized as providing "that Google is allowed . . . [to] take a look at the content of [users'] e-mail and . . . target advertising at [users] accordingly." *Warshak*, 2008 WL 2698177 at *5; *see also id.* at *8 (noting "tradeoff" between privacy and free e-mail). If a provider has physical access to a stored communication, and if its terms of service announce that the provider may access that communication for various purposes (especially including responding to requests from law enforcement), those circumstances must be considered in a Fourth Amendment analysis. *See Smith*, 442 U.S. at 742-43 (citing notices in telephone books as evidencing what "[t]elephone users . . . typically know").

Whether an individual has a reasonable expectation of privacy "is a context-specific inquiry," *Leonel v. American Airlines*, 400 F.3d 702, 712 (9th Cir. 2005), and the "constitutional validity of a warrantless search is pre-eminently the sort of question which can only be decided in the concrete factual context of the individual case," *Sibron*, 392 U.S. at 59. That is why the Sixth Circuit *en banc* recently rejected a categorical claim that the Fourth Amendment protects all e-mail. *See Warshak v. United States*, No. 06-4092,

2008 WL 2698177 (6th Cir. July 11, 2008) (en banc). The Sixth Circuit held, among other things, that whether particular e-mail users reasonably expect privacy is a fact-intensive inquiry unsuited to categorical holdings: it is "an inquiry that may well shift over time, that assuredly shifts from internet-service agreement to internet-service agreement and that requires considerable knowledge about ever-evolving technologies." *Id.* at *4. Recognizing how fact-bound and case-specific the question is, "courts typically look at the 'totality of the circumstances,' reaching case-by-case determinations that turn on the concrete, not the general, and offering incremental, not sweeping, pronouncements of law." *Id.* at *6 (citations omitted).

All this points to several fundamental errors with the panel's opinion.

First, the panel's holding purported to be broad, applying generally to all "users," and based on a categorical distinction between content and non-content, acknowledging few other contextual facts. *Warshak*, however, illustrates the wisdom of a case-specific approach that focuses on whether the individuals before the court may reasonably expect that their communications will remain private.

Second, the panel supported its privacy holding with cases dealing with whether the physical objects that *contained* messages were private. *See United States v. Finley*, 477 F.3d 250, 259 (5th Cir. 2007) ("Finley had a right to exclude others from using the

phone"); *United States v. Heckencamp*, 482 F.3d 1142, 1146-47 (9th Cir. 2007) (finding privacy "in his computer and dorm room"); *United States v. Ziegler*, 474 F.3d 1184, 1189-90 (9th Cir. 2007) (finding privacy "in his office"). Cases dealing with how the Fourth Amendment applies to the privacy in a physical object in the control of a person are inapposite because the city did not search Quon's pager: it obtained copies of text messages stored in the hands of a third party that had unfettered access to them.

Third, the panel ignored the third-party disclosure doctrine. Other federal courts found that doctrine relevant to whether information transmitted to a communications provider remained private. *See Smith*, 442 U.S. at 743-44; *Perrine*, 518 F.3d at 1204 (collecting cases). Instead, the panel used the doctrinally incorrect formulation that "users do have a reasonable expectation of privacy in the content of their text messages *vis-a-vis the service provider.*" Slip op. at 7020 (emphasis added). But the Fourth Amendment bars only government conduct; one cannot have a Fourth Amendment-recognized privacy interest "vis-à-vis" a private entity. *See United States v. Jacobsen*, 466 U.S. 109, 113-14 (1984).

As discussed below, a proper context-sensitive inquiry would have concluded, based on the privacy policies and statutes that applied to Jeff Quon's account, that there was no reasonable expectation of privacy.

II. THE PLAINTIFFS COULD NOT REASONABLY EXPECT THAT THEIR TEXT MESSAGES WERE PRIVATE BECAUSE THE DEPARTMENT HAD A POLICY SAYING THEY WERE NOT

The city's policy put all employees on notice that "[a]ccess to the Internet and the e-mail system is **not** confidential," and that "[u]sers should have no expectation of privacy or confidentiality when using these resources." Slip op. at 7003. Policies such as these are common. They help public and private employers detect possible misconduct by their employees.

Yet the panel held that despite the city's clear official policy, Quon had an expectation of privacy in the messages he sent over the city's pager system. The panel pointed to Lieutenant Duke, a man "weary of his role as bill collector," who bargained with staff that he would not audit their pagers if they agreed to pay the overage costs. Slip op. at 7005, 7023. According to the panel, though Lieutenant Duke "was not the official policymaker, or even the final policymaker," he was "in charge of the pagers," so his statement was an "informal policy" upon which Jeff Quon reasonably relied. Slip op. at 7023-24.

This error raises a question of exceptional importance because it puts into doubt employee agreements and privacy policies used across the private sector and government to assist internal investigators in identifying possible corruption, threats to security, or abuse of government resources

or authority. If government employers cannot rely on these legal and appropriate rules, it could affect the safety of workplaces and the security of government and military computer networks.

When a written policy formally announces that parties "should have no expectation of privacy or confidentiality," a party's expectation of privacy cannot be one that "society is prepared to consider reasonable," *Illinois v. Caballes*, 543 U.S. 405, 408 (2005). Nothing could be more unreasonable than to expect privacy after being told there is none. It is even tougher to conclude that plaintiffs Jeff Quon and Steven Trujillo had a reasonable expectation of privacy after they signed an acknowledgment stating, barely two inches from the signature line, that they had "no expectation of privacy." SER00454-55. It is more difficult still to find a reasonable expectation of privacy when, as the panel assumed, a public records law allowed *anyone* to demand copies of Jeff Quon's messages. *See* slip op. at 7024.

The panel recognized that the department's policy was significant. The panel cited cases holding that employer policies negate any expectation of privacy. *See* slip op. at 7022. In one case, this Court found no reasonable expectation of privacy if an employee "was on notice from his employer that searches of the type to which he was subjected might occur from time to time for work-related purposes." *Schowengerdt v. Gen. Dynamics Corp.*, 823 F.2d 1328, 1335 (9th Cir. 1987). In general, public employees such as Jeff Quon lack a reasonable expectation of

privacy when their employers' policies permit searches and monitoring communications. *See, e.g., United States v. Simons*, 206 F.3d 392, 398-99 (4th Cir. 2000) (CIA employee lacked expectation of privacy in Internet communications in light of employer's policy); *United States v. Broadus*, 7 F.3d 460, 464 (6th Cir. 1993). Two district courts (one cited by the panel) have held that police officers do not have reasonable expectations that messages they send over police pagers will remain private. *See Adams v. City of Battle Creek*, 250 F.3d 980, 986 (6th Cir. 2001) (noting that "the district court agreed . . . that plaintiff had no right to privacy in his department-issued pager," but avoiding the Fourth Amendment issue); *Bohach v. City of Reno*, 932 F.Supp. 1232, 1235 (D. Nev. 1996) ("only a diminished expectation of privacy would be reasonable" because the department "notif[ied] all users that their messages would be 'logged on the network'").

The panel concluded that the department's policy was immaterial; it was "not the 'operational reality' at the Department" because Lieutenant Duke had chosen not to audit Quon's account before. Slip op. at 7023. Similarly, the public records law was immaterial because public records requests were not "widespread or frequent." *Id.* at 7024. Under this reasoning, Fourth Amendment protection depends not on the announced lack of privacy in the messages, but on whether the department (or the public) chose in the past to take advantage of that lack of privacy. Essentially, the panel punished the city not so much

because it read Jeff Quon's messages *once*, but because the city had not read those messages *more often in the past*.

The Supreme Court rejected just such an argument in *Smith v. Maryland*, 442 U.S. 735 (1979). There, the defendant argued that even though the phone company had the ability to record the phone number he dialed for local calls, "telephone companies, in view of their present billing practices, usually do not record local calls." *Id.* at 745. The Court rejected that argument, holding that "[t]he fortuity of whether or not the phone company in fact elects" to record a number dialed "does not in our view, make any constitutional difference." *Id.* What *did* make a difference was that "[r]egardless of the phone company's election, petitioner voluntarily conveyed to it information that it had facilities for recording and that it was free to record." *Id.* The panel's opinion poses the same problems as the argument the Supreme Court rejected: by basing its decision on the *choice* not to read Quon's messages rather than on the *acknowledged ability* to do so, the panel tied Fourth Amendment protection not to the reasonableness of privacy expectations but to the fortuity of organizations' operational practices.

Tying Fourth Amendment protection to those operational practices could make complying with the Fourth Amendment especially difficult for criminal investigators. Because investigators often will not know beforehand all the relevant "operational realities," they may be unable to assess reliably whether

their behavior comports with the Fourth Amendment. For example, investigators might rely on a privacy policy in requesting an audit, only to learn later that a help-desk staffer had nullified that policy orally. The panel's statements thus potentially create an extraordinary and unworkable rule. In every other application, whether an investigator complies with the Fourth Amendment depends on what the investigator reasonably knew: "what is generally demanded of the many factual determinations that must regularly be made by agents of the government . . . is not that they always be correct, but that they always be reasonable." *United States v. Hawkins*, 249 F.3d 867, 875 (9th Cir. 2001), *quoting Illinois v. Rodriguez*, 497 U.S. 177, 185-86 (1990).

The panel also suggested that the authoritative operational policy was not the one issued by the department and acknowledged by plaintiffs, but the "informal" policy gleaned from Lieutenant Duke's words and inaction. Thus, if the panel's opinion were to stand, the ability of the leaders of an agency to set binding privacy policies could be substantially impaired. Even if they unambiguously announce that there is no expectation of privacy, their Lieutenant Dukes can contradict them and potentially create expectations of privacy. This cannot be what the Fourth Amendment requires; an employee's reliance on a promise made by a non-policy-making official in the face of a clearly stated and acknowleged [sic] privacy policy is not reasonable.

III. THERE IS NO REASONABLE EXPECTATION OF PRIVACY IN TEXT MESSAGES ALREADY SENT AND RECEIVED

The city audited only Jeff Quon's account. The other three plaintiffs base their Fourth Amendment claims solely on the theory that they had a reasonable expectation of privacy in the messages they sent to Quon's account. In reversing summary judgment on those claims, the panel ignored a substantial body of law rejecting the argument that senders of communications retain privacy in those communications after sending them. This error raises a question of exceptional importance because it casts confusion over law enforcement's ability to obtain stored communications.

In *United States v. Meriwether*, 917 F.2d 955 (6th Cir. 1990), the Sixth Circuit held that a defendant had no reasonable expectation that a numeric page he sent to someone else's pager would remain private. The defendant sought to exclude a message he had sent to another pager, not knowing that police had that pager in their possession. The court noted that "[a] party sending a message to a pager has expressed his subjective desire to preserve his privacy even less than in the telephone situation," because "he runs the risk that the message will be received by whomever is in possession of the pager." *Id.* at 959. The expectation of privacy is invalid because "one who sends a message to a pager has no external indicia that the message actually is received by the intended recipient"; thus, "he runs the risk that either the owner

or someone in possession of the pager will disclose the contents of his message." *Id.*

Meriwether is one in a long line of cases establishing that senders of communications lose their privacy rights in those communications after transmission. Although the Fourth Amendment protects sealed letters in transit, "if a letter is sent to another, the sender's expectation of privacy ordinarily terminates upon delivery." *United States v. King*, 55 F.3d 1193, 1195-96 (6th Cir. 1995) (citations omitted). The same rule applies to electronic mail: e-mail users lack "a legitimate expectation of privacy in an e-mail that had already reached its recipient." *Guest v. Leis*, 255 F.3d 325, 333 (6th Cir. 2001). *See also SEC v. Jerry T. O'Brien, Inc.*, 467 U.S. 735, 743 (1984) ("when a person communicates information to a third party even on the understanding that the communication is confidential, he cannot object if the third party conveys that information or records thereof to law enforcement authorities."); *United States v. Heckencamp*, 482 F.3d 1142, 1146 (9th Cir. 2007) (an "expectation of privacy may be diminished" for "transmissions over the Internet or e-mail that have already arrived at the recipient"); *United States v. Kenny*, 645 F.2d 1323, 1338-39 (9th Cir. 1981) (rejecting defendant's argument that a phone call recording made by the person he was speaking to violated the Fourth Amendment).

Jeff Quon's co-plaintiffs have a particularly weak argument that their messages remained private, because they knowingly sent their messages to a

police department account. Not only do senders lack knowledge of what privacy policy applies to a recipient, but few actions demonstrate an expectation of privacy less than the transmission of information to the work account of a public employee charged with enforcing the law.

The panel conceded that Jeff Quon's correspondents would "have no claims" if Quon "voluntarily permitted the Department to review his text messages." Slip op. at 7021. However, the panel held they nonetheless "had a reasonable expectation that the Department would not review their messages absent consent from either a sender or recipient of the text messages." *Id.*

Under the panel's reasoning, the Fourth Amendment protects senders of text messages more than senders of letters. Rather than analyze whether expectations of privacy were reasonable, the panel analyzed whether predictions of loyalty were correct. According to the panel, Quon's co-plaintiffs' expectations of privacy would be reasonable if Quon kept their messages private, but unreasonable if Quon were to forward a message accidentally, forget his pager on a park bench, or guiltily turn it over to authorities. This is error. Whether an expectation is reasonable turns not on chance but on whether the expectation is one that "society is prepared to consider reasonable." *Caballes*, 543 U.S. at 408. Regardless of whether Quon did these things, the fact remains that he could have, and the panel should have joined the courts cited above in concluding that senders

retain no objectively reasonable expectation of privacy once the message is received.

CONCLUSION

The municipal defendants' petition for rehearing should be granted, the panel's opinion should be vacated, and the summary judgment for the municipal defendants should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached amicus brief in support of a petition for rehearing en banc is proportionately spaced, has a typeface of 14 points or more and contains *4,189* words (petitions and answers must not exceed 4,200 words).

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OPPOSITION BRIEF

Nos. 08-1332 & 08-1472

Supreme Ct., U.S.
FILED
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In The
Supreme Court of the United States

CITY OF ONTARIO,
ONTARIO POLICE DEPARTMENT,
and LLOYD SCHARF,

Petitioners,

v.

JEFF QUON, et al.,

Respondents.

USA MOBILITY WIRELESS, INC.,

Petitioner,

v.

JERILYN QUON, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS JEFF QUON, ET AL.

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QUESTIONS PRESENTED BY ONTARIO'S PETITION

1. Whether a SWAT team member has a reasonable expectation of privacy in text messages transmitted on his SWAT pager, where the police department has no formal no-privacy policy pertaining to text message transmissions and the operational realities of the police department are such that SWAT team members are explicitly told their messages would remain private if they paid any additional overage charges.

2. Whether Petitioner Ontario fails to show a true conflict among the various circuits worthy of this Court's review, especially when the Ninth Circuit did not utilize a "less intrusive means" analysis and specifically stated so.

3. Whether employees who send text messages to other employees' pagers have a reasonable expectation of privacy in those messages, when the employees are each aware that the employer has a policy of not reviewing the text messages.

QUESTIONS PRESENTED BY ARCH WIRELESS' PETITION

1. Whether Arch Wireless has failed to preserve for review its argument that it is a dual provider.

2. Whether Arch Wireless is properly considered an "electronic communication service" – defined as "any service which provides to users thereof the ability to send or receive wire or electronic communications" – when it contracted with Ontario to allow SWAT team members to send or receive electronic text messages.

PARTIES TO THE PROCEEDINGS

Petitioners (Defendants and appellees below):

CITY OF ONTARIO, ONTARIO POLICE DEPARTMENT, and LLOYD SCHARF

ARCH WIRELESS OPERATING COMPANY, INCORPORATED (listed on petition as USA Mobility Wireless, Inc.)

DOREEN KLEIN

Respondents (Plaintiffs and appellants below):

JERILYN QUON, APRIL FLORIO, JEFF QUON, STEVE TRUJILLO, and DEBBIE GLENN

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INTRODUCTION

The appellate decision below arose out of litigation brought by Jerilyn Quon, April Florio, Jeff Quon, and Steve Trujillo (collectively "Plaintiffs") against the City of Ontario (their employer) and Arch Wireless Operating Company ("Arch Wireless").[1]

With respect to the City of Ontario, Plaintiffs allege that the City, its Police Department and its Chief of Police, Lloyd Scharf (collectively "Ontario"), violated their Fourth Amendment rights by requesting from Arch Wireless and reviewing private text messages transmitted via City-owned pagers. With respect to Arch Wireless, Plaintiffs allege that Arch violated the Stored Communications Act ("SCA") by divulging to Ontario the text messages.

The appellate decision held that Ontario's unique practice of allowing employees to maintain their privacy by not reviewing the text messages in exchange for payment by the employee of any overage charges created a reasonable expectation of privacy. Both the trial court and the appellate court below found that this reimbursement policy was in fact the "operational reality" within Ontario and expressly provided the Plaintiffs with an expectation of privacy. Furthermore, the appellate decision held that the search was justified at its inception, but was

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[1] Arch Wireless later merged and became USA Mobility Wireless, Inc. For ease of reference, Plaintiffs will refer to Arch Wireless in this brief.

unreasonable in its scope. Accordingly, the appellate decision below concluded that Ontario violated the Plaintiffs' Fourth Amendment rights.

With regard to Arch Wireless, the appellate decision reviewed the plain language of the SCA as well as its rather unambiguous legislative history and found that Arch Wireless' services were properly considered an "electronic communication service" under the SCA. Since Arch Wireless provided an electronic communication service, it could not lawfully disclose the text messages without permission of an "addressee or intended recipient." Accordingly, the appellate decision below concluded that Arch violated the SCA.

Ontario filed a Petition for a Writ of Certiorari, while Arch Wireless filed a Conditional Cross-Petition for a Writ of Certiorari. However, neither Petitioner has presented any "compelling reasons" in support of their Petitions. *See* Sup. Ct. R. 10.

Ontario attempts to inflate their cause by suggesting that the appellate decision creates a split in circuits by utilizing a "less intrusive means" analysis. This argument, however, is belied by the plain language of the appellate decision as well as the panel's opinion in denying Ontario's rehearing petition. The appellate decision itself carefully applies the correct legal standard. Any lingering doubt was dispelled in the panel's opinion where the decision author, Judge Wardlaw, unambiguously stated that the panel did not apply a "less intrusive means" analysis.

Next, Ontario argues that the appellate decision is erroneous because it hinges Plaintiffs' expectation of privacy entirely upon Ontario's unique practice of not reviewing text messages in exchange for payment of the overages. Ontario claims that in reaching this conclusion, the Ninth Circuit undermined the "operational realities of the workplace" standard. However, the appellate decision does just the opposite. The appellate decision reflects a careful consideration of the working environment and operational realities that exist within Ontario Police Department. Ignoring Ontario's unique practice, as Ontario suggests, would be to ignore the operational realities standard altogether.

Ontario's final claim is that the appellate decision expands Fourth Amendment protection beyond reasonable limits. Like the others, Ontario attempts to breathe life into their cause by exaggerating the issue. The decision does not expand constitutional protections and involves four employees of Ontario Police Department who were each aware of Ontario's unique practice of keeping text messages private. In practical terms, the decision is insignificant since it is based entirely on Ontario's own unique practice, and one that most employers would not embrace.

Arch Wireless' Petition is even more tenuous. Arch Wireless argues the appellate decision is erroneous because it applied a categorical approach when examining Arch Wireless' service. However, Arch Wireless invited both the District Court and the

Ninth Circuit to apply such an approach and has not preserved the issue for review.

Simply put, Ontario and Arch Wireless have failed completely to carry their burden of demonstrating that there are any compelling reasons for this Court to grant their Petitions. Accordingly, the Petitions should be denied.

STATEMENT OF THE CASE

In 2001, Arch Wireless contracted to *provide wireless text-messaging services* for the City of Ontario. The City received twenty two-way alphanumeric pagers, which it distributed to its employees, including Jeff Quon and Steve Trujillo, who were employed as police sergeants. Opinion, App. 3.[2]

Ontario had no official no-privacy policy directed to text-messaging by use of the pagers. However, it did have a general policy about computer and internet usage that indicated Ontario reserved the right to monitor email and internet usage. In 2000, before Ontario acquired the pagers, Trujillo and Quon signed an acknowledgment form indicating they were aware of this policy. Opinion, App. 4.

[2] All references to "App." shall refer to Ontario's appendix.

Two years after signing the acknowledgement form, Quon attended a meeting during which Lieutenant Steve Duke informed all present that the pager messages "were considered e-mail, and that those messages would fall under the City's policy as public information and eligible for auditing." Quon "vaguely recalled attending" this meeting, but did not recall Lieutenant Duke stating at the meeting that use of the pagers was governed by the City's Policy. Opinion, App. 5.

Although Ontario had no official policy expressly governing use of the pagers, it did have an informal policy governing their use. Under Ontario's contract with Arch Wireless, each pager was allotted 25,000 characters, after which Ontario was required to pay overage charges. Lieutenant Duke "was in charge of the purchasing contract" and responsible for procuring payment for overages. He stated that "[t]he practice was, if there was overage, that the employee would pay for the overage that the City had. . . . [W]e would usually call the employee and say, 'Hey, look, you're over X amount of characters. It comes out to X amount of dollars. Can you write me a check for your overage[?]' " Opinion, App. 6.

The informal policy allowed officers to maintain their privacy in their text messages as long as they paid the overage charges. Sergeant Quon testified that Lieutenant Duke would tell him that "if you don't want us to read it, pay the overage fee." Per the policy, Quon went over the monthly character limit

"three or four times" and paid Ontario for the overages. Opinion, App. 8.

In August 2002, Quon and another officer again exceeded the 25,000 character limit and Lieutenant Duke let it be known at a meeting that he was "tired of being a bill collector." In response, Chief Scharf ordered Lieutenant Duke to "request the transcripts of those pagers for auditing purposes." Opinion, App. 8.

Ontario was not able to access the text messages themselves. Instead, they contacted Arch Wireless who voluntarily disclosed the transcripts to Ontario without notifying Plaintiffs. Opinion, App. 9.

REASONS FOR DENYING ONTARIO'S PETITION

Ontario does its best to inflate this case into one creating a split in circuits and a "startling extension of Fourth Amendment privacy rights." *See* Ontario Pet. 15. However, this case involves nothing of the sort.

Contrary to Ontario's claim, the appellate decision makes clear that it did not adopt a "less intrusive means" analysis. Furthermore, the decision is a rather straightforward application of the factors espoused in *O'Connor v. Ortega*, 480 U.S. 709 (1987). In fact, the decision itself is entirely dependent upon Ontario's self-initiated practice of allowing employees

to maintain their privacy. Quite candidly, the appellate decision acknowledged that Ontario was its own worst enemy.

I. The Ninth Circuit Did Not Adopt A "Less Intrusive Means" Test And Did Not Create A Split In The Circuits.

Ontario claims that the appellate decision below creates a split in the circuits and departs from Supreme Court precedent by applying a "less intrusive means" test. The court, however, never adopted a less intrusive means test, and the author of the panel opinion explicitly disclaimed doing so. Ontario's argument stems entirely from the court's citation to *Schowengerdt v. General Dynamics Corp.*, 823 F.2d 1328 (9th Cir. 1987), and is a desperate attempt to blow life into its petition.

Ontario spends time and ink explaining how this Court has cautioned against the use of the "less intrusive means" test, but completely fails to demonstrate that the appellate decision below did use such a test.

In fact, Ontario made the exact same argument it makes here to the Ninth Circuit in its Petition for Panel Rehearing and Rehearing En Banc. In denying the Petition for Panel Rehearing, the panel responded as follows:

> We did not adopt a "less intrusive means" test. [citation omitted]. The "less intrusive

means" discussion relates to the jury's finding that Chief Scharf conducted the search for noninvestigatory purposes. *O'Connor* provides the framework for evaluating the reasonableness of a search in this context, which the dissent does not dispute. [citation omitted]. Applying this framework, we first held that the search was reasonable "at its inception" because the officers conducted the search for the work-related purpose of ensuring that "officers were not being required to pay for work-related expenses," as the jury had found below. *Quon*, 529 F.3d at 908. We then turned to the second prong of the *O'Connor* test: determining whether the measures adopted were "reasonably related to the objectives of the search and not excessively intrusive in light of . . . the nature of the [misconduct]." 480 U.S. at 726, 107 S.Ct. 1492 (internal quotation marks omitted). Because "the Department opted to review the contents of all the messages, work-related and personal, without the consent of Quon," we held that the search "was excessively intrusive in light of the noninvestigatory object of the search." *Quon*, 529 F.3d at 909. This holding was also based on our conclusion that Quon's "reasonable expectation of privacy in those messages" was not outweighed by the government's interest – again, as found by the jury – in auditing the messages. *Id.*

The dissent incorrectly represents that we held that the search was unreasonable "*because* the city could have used less

> intrusive means to accomplish the objectives of the search." [citation omitted] (emphasis added). Although we cited *Schowengerdt v. General Dynamics Corp.*, 823 F.2d 1328, 1336 (9th Cir. 1987), we did not apply a "less intrusive means" test. *Quon*, 529 F.3d at 908-09; cf. Dissent at 777-78 (conceding that "the panel does not explicitly state it is applying a least restrictive means test"). We mentioned other ways the OPD could have verified the efficacy of the 25,000-character limit merely to illustrate our conclusion that the search was "excessively intrusive" under *O'Connor*, when measured against the purpose of the search as found by the jury. *Quon*, 529 F.3d at 909.

Finally, the panel explained that it "only considered *Schowengerdt* to the extent necessary to consider the district court's decision." *See* Opinion, App. 134 fn.1. That the authors of the opinion expressly state that their opinion did not utilize the "least intrusive means" test should dispel the Petitioner's claim.

Furthermore, Ontario's argument places form over substance. The appellate decision could have just as easily not included the citation to *Schowengerdt*, and the holding would not change. The decision clearly identifies that it is assessing whether the measures Ontario took were reasonably related to the objectives of the search and were not excessively intrusive. The Ninth Circuit correctly examined whether "the depth of the inquiry or extent of the

seizure exceeded that necessary for the government's legitimate purposes." Opinion, App. 35. The Ninth Circuit did not automatically find the search unreasonable based merely on the existence of less intrusive means, but rather because the means that were used were excessive and unreasonable in light of the relatively insignificant need for the information. The Ninth Circuit applied the proper analysis and reached an appropriate decision based upon all of the circumstances. Since the Ninth Circuit did not utilize a "less intrusive means," no split among the circuits was created and review is not necessary.

II. The Ninth Circuit's Ruling That Ontario Created A Reasonable Expectation Of Privacy Does Not Warrant Review By This Court.

Ontario seeks review by this Court simply because it is unhappy with the appellate decision below. In support, Ontario offers no significant legal or factual argument, and in no way attempts to demonstrate that review is appropriate under Rule 10 of the Rules of the Supreme Court.

In essence, Ontario feels that Lieutenant Duke should not be able to establish an expectation of privacy among the officers he oversees. More than that, Ontario suggests that both the District Court and the Ninth Circuit erred when they even considered Lieutenant Duke's policy when examining whether there was an expectation of privacy.

However, both the District Court and the Ninth Circuit properly applied the *O'Connor* test, recognizing:

> Lieutenant Duke made it clear to the staff, and to Quon in particular, that he would not audit their pagers so long as they agreed to pay for any overages. Given that Lieutenant Duke was the one in charge of administering the use of the city-owned pagers, his statements carry a great deal of weight. Indeed, before the events that transpired in this case the department did not audit any employee's use of the pager for the eight months the pagers had been in use. Opinion, App. 30.

Even Ontario concedes "[t]o that point, the panel's reasoning is a straightforward application of *O'Connor's* 'operational realities of the workplace' standard." *See* Ontario Pet. 16. In other words, the Ninth Circuit applied the appropriate reasoning, but simply reached an unfavorable result.

Ontario is asking this Court to review and conclude as a matter of law that the actions of a high-ranking official within a police department should not be considered when evaluating the "operational realities of a workplace." However, the notion presented by Ontario in and of itself erodes the very standard they profess to be supporting. *O'Connor* makes clear that analyzing an expectation of privacy involves an in-depth factual inquiry, and that actual office practices or procedures may affect one's expectation of privacy. The District Court and the Ninth Circuit did

just that, and Ontario simply disagrees with the outcome.

Furthermore, the inquiry here is predicated upon a unique set of facts that presents no important constitutional question and no other basis for review by this Court. Ontario had no official policy with regard to the use of text-message pagers. The only mention of text-messages was at a meeting where Ontario informed only those employees in attendance that the e-mail policy applied to the text-message pagers. Ontario did not bother to publicly notify anyone, or even send out a written policy. Quon had no recollection of that being discussed at the meeting.[3] Opinion, App. 5-6. Thus, the City's actions, which include Lieutenant Duke's policy, each contributed to the finding of a reasonable expectation of privacy.

In *O'Connor*, this Court mandated a "'case-by-case' approach to determining whether an employee has a reasonable expectation of privacy in the workplace." *O'Connor*, 480 U.S. at 718. The appellate decision below follows this Court's instruction that "public employer intrusions on the constitutionally protected privacy interests of government employees

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[3] Essentially, Ontario is advocating for a "per se rule" that employees may never have privacy in their workplace pagers. Such a rule would require courts to ignore the fact that Ontario had no written workplace policy on pagers and the day-to-day practice that officers would retain their privacy as long as they paid the overages. Ontario's per se rule would eviscerate the "operational realities" standard.

. . . should be judged by the standard of reasonableness *under all the circumstances*." *Id.* at 725-26. As such, the ruling below does not merit review by this Court.

III. The Ninth Circuit's Opinion Is Consistent With This Court's Precedent

Ontario further argues that review is warranted based upon the Ninth Circuit's conclusion that Trujillo, Florio and Jerilyn Quon maintained an expectation of privacy in the text-messages sent to Jeff Quon on his Department-issued pager. The argument is that it is not objectively reasonable to expect privacy in text-messages sent to someone else's workplace pager, despite the unique circumstances.

Ontario offers no legal or factual support that the appellate decision is erroneous. Without citing any authority, Ontario claims "[i]t is not objectively reasonable to expect privacy in a message sent to someone else's workplace pager." Ontario Pet. 30. However, the Ninth Circuit's decision reflects a rather straightforward analysis of the facts of this case with this Court's prior decisions. Moreover, the decision itself does not expand rights.

Ontario concedes that the appellate decision properly analogized text-messages to telephone calls, regular mail, and e-mail, but simply reached the wrong result. Ontario's entire claim is that in order for Trujillo, Florio and Jerilyn Quon's expectation of privacy to be objectively reasonable, "the sender

would have to believe the recipient's employer does *not* have a no-privacy policy in place. . . ." Ontario Pet. 30.

In passing, Ontario asserts that the Ninth Circuit expressly did not rely upon Lieutenant Duke's informal policy when reaching its conclusion as to Trujillo, Florio and Jerilyn Quon. This claim is overstated. The appellate decision makes clear, and Ontario concedes, that Trujillo was a SWAT team member, subject to Lieutenant Duke's informal policy. Since Trujillo was also subject to and aware of the privacy policy, the analysis with respect to Trujillo would be the same as it is with Quon.

Furthermore, the undisputed evidence provided by Florio and Jerilyn Quon in their declarations is that they had no reason to believe that the Department would review the messages they sent Quon. This understanding was based upon Lieutenant Duke's informal policy. In fact, both the District Court and the Ninth Circuit acknowledged that "Lieutenant Duke made it clear *to the staff*, and to Quon in particular, that he would not audit their pagers so long as they agreed to pay for any overages." Opinion, App. 30. Florio and Jerilyn Quon were staff.

Thus, Ontario's concerns about the breadth of the appellate decision are unfounded. This is not a case that involves a private individual sending a text message to a public employee and expecting privacy. The Plaintiffs are public employees working for Ontario who maintained an expectation of privacy

based upon Lieutenant Duke's informal policy. Ontario's attempt to exaggerate the issue into one that "extends Fourth Amendment protection" is unavailing. Ontario Pet. 28.

Since the Plaintiffs did in fact have a belief that their text messages would remain private, by Ontario's own argument, the Plaintiffs' expectation of privacy would be reasonable.

Finally, the Ninth Circuit's decision is further based upon its conclusion that the Plaintiffs maintained an expectation of privacy under the Stored Communications Act, found at 18 U.S.C. §§ 2701-2711. The appellate decision concludes "[a]s a matter of law, Trujillo, Florio and Jerilyn Quon had a reasonable expectation that the Department would not review their messages absent consent from either a sender or recipient of the text messages." Opinion, App. 28-29.

As will be explained further below, the Ninth Circuit's decision with regard to the Stored Communications Act is correct. The fact that the Plaintiffs' text messages were protected from disclosure under the Stored Communications Act served as a legal basis for the Plaintiffs to objectively believe that their text messages would remain private. Since Ontario has failed to address the appellate decision on this point, they cannot successfully argue that the Ninth Circuit was erroneous and that review is warranted.

REASONS TO DENY ARCH WIRELESS' CONDITIONAL CROSS-PETITION

Arch Wireless has not presented a compelling reason for this Court to grant review. Arch Wireless chose not to file its own petition, and only filed this conditional cross-petition on the 30th day after Ontario filed its own petition. Furthermore, in Ontario's petition, it did not argue that the Ninth Circuit erred in its ruling against Arch Wireless. In fact, the petition is utterly silent as to that claim. Attempting an end-around, Arch Wireless now claims that the appellate decision is wrong with respect to the SCA and warrants review.

Arch Wireless' primary argument in support of review is that the Ninth Circuit's interpretation of the SCA is "incorrect and unworkable." *See* Arch Wireless Pet. 11. More specifically, Arch Wireless argues that the Ninth Circuit improperly applied an "all-or-nothing" approach in determining whether Arch Wireless was a provider of an "electronic communications service" ("ECS") or a "remote computing service" ("RCS"). Arch Wireless claims that the Ninth Circuit erroneously failed to consider that it could be providing a dual service. In addition, Arch Wireless argues that the Ninth Circuit erred by "automatically" concluding that Arch Wireless stored messages for purposes of backup protection simply because it was an ECS provider. Arch Wireless' claims are simply disingenuous.

Arch Wireless fails to inform this Court that it was Arch Wireless itself who has maintained from the beginning that it was solely a RCS. The revelation that it now provided a "dual service" was never suggested until after the Ninth Circuit issued its opinion and Arch Wireless submitted its petition for rehearing. In fact, it was Arch Wireless who asked both the District Court and the Ninth Circuit to apply a so-called "all or nothing" approach. To claim that the Ninth Circuit erred by applying the approach Arch Wireless suggested does not merit review.

More importantly, the panel did not apply such a rigid approach. Rather, the panel decision reflects a thorough analysis of the service Arch Wireless provided and an appropriate conclusion. Arch Wireless is clearly an ECS based upon the plain language of the statute. Arch Wireless clearly stores messages for backup protection based upon the undisputed evidence that they, among other things, "archive" messages for "recordkeeping purposes." The panel reached this conclusion based upon the evidence.

I. Arch Wireless' Claim That The Ninth Circuit Applied An "All Or Nothing" Approach Is Unavailing.

Arch Wireless' primary argument in support of review is that the Ninth Circuit "incorrectly assumed that a provider may have only one classification for all of the services it provides, at all times." *See* Arch

Wireless Pet. 12. Arch Wireless argues "[t]he court mistakenly reasoned that because Arch Wireless provided the underlying transmission of the text messages, it must be an 'electronic communication service' for all purposes. . . ." *See* Arch Wireless Pet. 12.

Nothing could be further from the truth.

The record is relatively clear that it was Arch Wireless who took the position from the outset that it provided a RCS "for the services it provides, at all times." Arch Wireless argued and proved that it provided a RCS exclusively. Not once did Arch Wireless ever suggest to the District Court that it provided a dual service, or that certain aspects of its service could be an ECS while others could be a RCS. Instead, Arch Wireless maintained it provided a RCS and could release the text messages to Ontario as a subscriber.

In its ruling at summary judgment, the District Court (who ultimately sided with Arch Wireless) correctly identified the inquiry:

> What is disputed is whether the service provided by Arch Wireless – that is, of being able to retrieve for its subscribers text messages held in long-term electronic storage on its computers that have been sent over its communication network – constitutes a remote computing service or is more properly characterized as an electronic communication service. If the former, then the City's consent would serve to absolve Arch Wireless of liability as it was the subscriber to the

> service. If the latter, then the City's consent is to no avail as only the consent of the originator or intended recipient of such a message (in this case, the plaintiffs themselves) would suffice for the exemption to apply. *See* Ontario Pet. App. 63.

Then, the District Court went on to make the very point Arch Wireless attempts to make now:

> This leads to another point that neither side in this case acknowledges – that Congress recognized that service providers can offer a wide variety of different services, each one being characters differently under the statute. . . . *See* Ontario Pet. App. 79.

With that in mind, the District Court noted that Arch Wireless took the position that it was either solely an ECS or a RCS:

> The parties in this case apparently take an 'all or nothing' approach in how to characterize what Arch Wireless provided to the City – either the provision of text-messaging pager/transcript retrieval service was a remote computing system or it was an electronic communication system. *See* Ontario Pet. App. 80.

On appeal, Arch Wireless' position remained the same. Before the Ninth Circuit, Arch Wireless conceded that its services could only be considered as that of a RCS: "Contrary to Appellants' contention, Arch Wireless provided a 'Remote Computing Service' to the City of Ontario under the terms of the statute."

See Arch Wireless' Opp. Brief, 8. At no time before the Ninth Circuit issued its decision had Arch Wireless ever suggested that it provided a dual service or that its services could ever be considered that of an ECS.

Now, after the Ninth Circuit applied a practical application of the plain language of the SCA, Arch Wireless now seeks to change course.

Knowing that it is impossible to argue around the SCA's definition of an ECS, Arch Wireless now concedes: "Arch Wireless unquestionably acts as an 'electronic communication service' provider when it transmits text messages over its network, and its temporary storage of contents in connection with the transmission process constitutes 'electronic storage.'" *See* Arch Wireless Pet. 16.

Recognizing futility, Arch gives in, and now claims that the panel decision is erroneous because it purportedly failed to take into account the dual functions Arch's service provides. Remarkably, Arch Wireless fails to inform this Court that it was Arch Wireless itself who asked the appellate court to ignore the possibility of a dual function. Because Arch Wireless failed to ever make this argument to either the District Court or the Ninth Circuit, they have failed to preserve it for review.

Next, Arch Wireless spends time and ink arguing that the statutory text of the SCA allows an entity to provide dual services. Arch Wireless points to the legislative history which it suggests confirms its position. The problem Arch Wireless faces is that it

never suggested that it provided a dual service and the claim is now waived. To claim error on the part of the Ninth Circuit for assuming that such a possibility existed – in light of Arch Wireless' expressed position to the contrary – is flawed. More importantly, it utterly fails to demonstrate that review is warranted in this case.

Moreover, Arch Wireless' argument that it is both an ECS and a RCS finds no support in the record. As noted above, Arch Wireless concedes (for the first time) that it acts as an ECS when it transmits text messages. However, Arch Wireless claims that "is not at issue" here. *See* Arch Wireless Pet. 16. Arch Wireless suggests that Plaintiffs allege that Arch Wireless violated the SCA by divulging to Ontario the contents of messages "that were retrieved from its long-term archives – long after the messages were delivered and the temporary storage was deleted." *See* Arch Wireless Pet. 16. This suggestion is wrong.

Plaintiffs have alleged and proven that Arch Wireless violated the SCA when it divulged messages held in "electronic storage" as that term is defined at 18 U.S.C. § 2510(17). Plaintiffs have never suggested that the messages were retrieved from "long term archives," and Arch Wireless never presented any such evidence. Likewise, Arch Wireless failed to present any evidence that the text messages had already

been delivered and that "temporary storage was deleted."[4]

More importantly, Arch Wireless' services could only be considered that of an ECS. An ECS is defined as "any service which provides to users thereof the ability to send or receive wire or electronic communications." 18 U.S.C. § 2510(15). On its face, this describes exactly the service that Arch Wireless provided to Ontario, as conceded by Arch Wireless.

In addition, to be considered a RCS, one must provide "computer storage or processing services." 18 U.S.C. § 2711(2). Based upon the evidence, it was clear that Arch Wireless was not providing "computer storage" or "processing services." Although Arch Wireless was "storing" messages, this incidental function was the type Congress clearly felt an ECS would perform.

The Ninth Circuit reviewed the legislative history of the SCA, and found that the Senate Report identified two main services that providers performed in 1986: (1) data communication; and (2) data storage and processing. The Ninth Circuit reasoned that when Congress referred to RCS's "storage and processing of information," it meant the actual storing of virtual information or the farming out of sophisticated processing to a service that would process the

---

[4] Virtually all of the evidence relied upon by the Ninth Circuit was from the testimony of Arch Wireless' Director of Information Technology.

information. Neither of these services even remotely describes the services Arch Wireless provided to Ontario. Since Arch Wireless could never qualify as a RCS based upon the plain language of the SCA, as well as its legislative history, the Ninth Circuit's decision represents a straightforward and legally sound decision. Not only has Arch Wireless failed to demonstrate that their position is legally sound, it has utterly failed to demonstrate that the issue is one that warrants review.

II. The Ninth Circuit's Opinion Does Not Warrant Review

The Ninth Circuit's opinion does not warrant this Court's review because there is no conflict to be resolved. In this case, Plaintiffs sought to enforce their rights under the SCA based upon Arch Wireless' disclosure of text messages to Ontario. Arch Wireless maintained throughout the proceedings below that it acted as a RCS and its disclosure to a subscriber was legally permissible. Plaintiffs argued that Arch Wireless acted as an ECS and since they did not consent to the disclosure, Arch Wireless acted illegally. The District Court sided with Arch Wireless, but the Ninth Circuit reversed. Beyond a simple disagreement with the outcome, Arch Wireless has offered no compelling reason for this Court to grant review.

Arch Wireless argues that review of the SCA would be necessary if review is granted as to Ontario. However, in Ontario's petition for review, not one

mention of the SCA is made. Ontario, who seeks review of the Fourth Amendment claim, does not feel that review of the SCA is necessary. In passing, Arch Wireless states review is necessary so this Court can "correct the Ninth Circuit's misguided understanding of the statutory framework." *See* Arch Wireless Pet. 18. However, Arch Wireless never identifies how the Ninth Circuit's opinion is wrong.

Finally, Arch Wireless makes an emotional plea that "the world's leading providers of computing and online services are located within the Ninth Circuit" and that a "host of unintended consequences" will result if review is not granted. *See* Arch Wireless Pet. 20-21. The claim is grossly overstated.

Contrary to the claim, not every "storage" maintained by a provider of electronic communication will automatically constitute "electronic storage." *See* Arch Wireless Pet. 21. A court will be required to review the actual service provided between the entity and the provider. Here, Ontario clearly paid Arch Wireless to provide it with the ability to "send or receive wire or electronic communications," or text messages. *See* 18 U.S.C. § 2510(15). Thus, the service it provided was that of an ECS.

Arch Wireless' suggestion that the Ninth Circuit somehow eviscerated a provider's ability to act as a RCS is simply false. If a provider provides "storage or processing services," then it is a RCS. What Arch Wireless is really advocating for is the ability to provide a service, but not comply with the federal

disclosure requirements. Arch Wireless allows individuals to communicate electronically and that decision to provide the service is significant and valuable in this electronic age. However, it also requires that they comply with what Congress has determined to be necessary steps to preserve the privacy rights of the individuals using that service. It is simply the price of doing business. If Arch Wireless feels that the SCA strikes an unfair balance in favor of privacy rights, then it should seek to have the law changed.

Arch Wireless has not demonstrated that the Ninth Circuit's opinion warrants review, or that the decision is legally flawed.

CONCLUSION

For the foregoing reasons, the Petitions brought by Ontario and Arch Wireless for writs of certiorari should be denied.

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REPLY BRIEF

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In The

Supreme Court of the United States

CITY OF ONTARIO, ONTARIO POLICE DEPARTMENT, and LLOYD SCHARF,

Petitioners,

v.

JEFF QUON, JERILYN QUON, APRIL FLORIO, and STEVE TRUJILLO,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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REPLY BRIEF FOR PETITIONERS

Respondents do not dispute that this case presents important Fourth Amendment issues involving the "operational realities of the workplace" standard – enunciated in *O'Connor v. Ortega*, 480 U.S. 709, 717 (1987) (plurality opinion) – for reasonable expectations of privacy in electronic communications in the workplace. Respondents fail to answer the petition's showing, amplified by amici curiae the League of California Cities and California State Association of Counties supporting the petition, that the Ninth Circuit opinion significantly and adversely impacts public entities' ability to ensure safe and efficient use of electronic communications. Nor do respondents offer any response to the demonstration by petitioners, and by the United States as amicus curiae supporting the petition for rehearing en banc in the Ninth Circuit, that the opinion casts doubt on employee agreements and privacy policies widely used in both the private and public sectors to ensure safe and efficient use of electronic communications resources.

Respondents make three arguments for denying the petition, none of which withstands scrutiny. First, they deny that the Ninth Circuit opinion adopts a "less intrusive means" test – which this Court and seven other circuits have rejected – for gauging whether the scope of a government workplace search is reasonable. But the opinion *expressly* applies that test. Second, they contend the opinion faithfully

applies *O'Connor*'s "operational realities of the workplace" standard. However, like the Ninth Circuit opinion, they focus exclusively on a non-policymaker's informal accommodation and ignore other vital realities such as the City's official no-privacy policy and potential disclosure of the communications as public records. Third, they rely on facts that are simply absent from the opinion to attempt to cabin its sweeping extension of Fourth Amendment protection to parties who send communications *to* a government workplace.

As petitioners explain below, respondents provide no basis to deny the petition or not to summarily reverse.

A. In Direct Conflict With Opinions Of This Court And Seven Other Circuits, The Ninth Circuit Opinion Undeniably Resurrects A Disapproved "Less Intrusive Means" Test.

Respondents argue that the Ninth Circuit opinion did not actually adopt the "less intrusive means" test of whether the search was reasonable in scope. Opp.2, 7-10. They rely almost exclusively on the opinion concurring in the denial of rehearing en banc. Opp.7-9. For reasons explained in the petition (Pet.22-23) and below, that reliance is futile.

The Ninth Circuit opinion plainly states that "'if less intrusive methods were feasible, ... the search would be unreasonable,'" quoting *Schowengerdt v.*

General Dynamics Corp., 823 F.2d 1328, 1336 (9th Cir. 1987). App.35. *Schowengerdt* purported to apply the *O'Connor* analysis for determining whether a government employer's search was reasonable in scope, but added requirements – no "less intrusive methods" and "no broader than necessary," 823 F.2d at 1336 – that were absent from, and incompatible with, *O'Connor*. Under *O'Connor*, "public employers must be given wide latitude" in carrying out administrative searches, which serve to "ensure the efficient and proper operation of the agency." 480 U.S. at 723 (plurality opinion).

While respondents contend that the opinion in this case "never adopted a less intrusive means test" (Opp.7), seven dissenting Ninth Circuit judges read the opinion as "do[ing] just that." App.145. The seven dissenting judges are not alone; commentators read it the same way. As one correctly observed, "the panel mistakenly used language from the *Schowengerdt* decision and found the OPD's search to be unreasonable based on an analysis of less intrusive means the city could have used when conducting the search of Quon's text messages." Justin Conforti, *Somebody's Watching Me: Workplace Privacy Interests, Technology Surveillance, and the Ninth Circuit's Misapplication of the* Ortega *test in* Quon v. Arch Wireless, 5 Seton Hall Cir. Rev. 461, 483 (2008-2009); *see also* Heather Wolnick, *The Extension of Privacy Rights to Workplace Text Messages under* Quon v. Arch Wireless, 39 Golden Gate U. L. Rev. 351, 356

(Spring 2009) (noting that "[t]he [*Quon*] court applied the 'least intrusive means' test").

Respondents cannot contest that this Court has "repeatedly" rejected "the existence of alternative 'less intrusive' means" as a basis for evaluating the reasonableness of searches under the Fourth Amendment. *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 629 n.9 (1989) (collecting cases) (citations omitted). The *Skinner* Court did so specifically in the context of workplace searches. *Id.* Seven other circuits have adhered to the Court's precedent. *See* Pet.21-22; App.147-49. "[B]y citing a pre-*Skinner* decision that is no longer good law as part of its analysis under the second [*O'Connor*] prong, the *Quon* panel not only departed from Supreme Court precedent and split from seven sister circuits but also upset the balance struck by the [*O'Connor*] plurality between the conflicting privacy interests of employers and employees." Conforti, *supra*, at 482.

In contrast, the Second Circuit set out what has been called "the model analysis" of a search's scope under *O'Connor*: "a court will identify the employer's interest at stake in the search and then determine whether the actual search conducted is reasonable in comparison." Conforti, *supra*, at 481 (citing *Leventhal v. Knapek*, 266 F.3d 64, 75-76 (2d Cir. 2001) (Sotomayor, J.)). Respondents gainsay the police department's interests here as "relatively insignificant." Opp.10. But *O'Connor* confirms that "public employers have a direct and overriding interest in ensuring that the work of the agency is conducted in

a proper and efficient manner." 480 U.S. at 724 (plurality opinion). That interest is particularly strong when the employer is a police department. *Dible v. City of Chandler*, 515 F.3d 918, 928 (9th Cir. 2008). On the other hand, respondents do not offer any countervailing interest on their part to use Sergeant Quon's Department-issued pager for highly personal, sometimes sexually graphic communications, even while he was on duty. Government employees' privacy interests in the workplace are diminished, *O'Connor*, 480 U.S. at 725 (plurality opinion), and Sergeant Quon "could have avoided exposure of his sexually explicit text messages simply by using his own cell phone or pager." App.143.

There is no merit to respondents' plea to simply ignore the opinion's reference to *Schowengerdt*'s less intrusive means test and to focus instead on the "substance" of the court's analysis. Opp.9-10. In form and substance, the opinion employs a less intrusive means analysis, hypothesizing "a host of simple ways" the Department could have conducted its administrative investigation. App.35. Again, petitioners and the seven dissenting judges are not the only ones who read the court's opinion as actually employing a less intrusive means analysis. *See* Conforti, *supra*, at 487-88 ("[T]he Ninth Circuit inquired into the reasonableness of the city's investigation based not on the actual search conducted, but rather on a litany of hypothetical less-intrusive means the city could have used when conducting the search...."); *see also id.* at 488 (citing the opinion's

"alternative, potentially burdensome methods the OPD could have utilized to discover the reason for Quon's regular monthly overages").

The concurrence's belated attempt to downplay the less intrusive means test does not ameliorate the damage done by the actual opinion. Respondents repeatedly refer to the concurrence as an opinion by the "panel." *E.g.*, Opp.2, 7, 9; *see also* Opp.9 (referring to the concurrence's "authors"). But no other judges joined the concurring judge's opinion. *See* App.125. Even more important, the panel did not amend the actual opinion to eliminate the express adoption and application of the discredited "less intrusive means" test of *Schowengerdt*.

If anything, the concurrence exacerbates the need for review by stating that the Department's review did not even constitute a "special needs" search. App.135. This is incompatible with *O'Connor*'s recognition of public employers' "special needs" to conduct legitimate work-related, noninvestigatory searches and investigations of work-related misconduct. 480 U.S. at 725 (plurality opinion); *accord*, *id.* at 732 (Scalia, J., concurring in the judgment).

Concurrence or not, as it now stands, the law in the Ninth Circuit – in direct conflict with multiple opinions of this Court and seven other circuits – is that lower courts must apply the less intrusive means test in assessing the scope of a search under *O'Connor*. On that ground alone, this Court should

grant the petition or summarily reverse. But if, as respondents assert, the Ninth Circuit's analysis somehow did not constitute a less intrusive means inquiry, then this Court should review this case to clarify what does constitute a less intrusive means analysis and under what circumstances a court may engage in the kind of analysis employed below.

B. The Opinion Undermines *O'Connor* By Exalting A Non-Policymaker's Informal Accommodation Above All Other Realities Of The Workplace.

As the petition established, the Ninth Circuit opinion mistakenly reasons that an employer's explicit no-privacy policy is abrogated by a lower-level supervisor's informal accommodation, and discounts entirely the potential disclosure of the text messages under public records laws, thus significantly impairing government employers' ability to manage their workforces. Pet.16-20. The opposition provides no adequate response.

Principally, respondents argue that petitioners seek to ignore Lieutenant Duke's informal bill-paying accommodation. Opp.10-12. Not so. Rather, petitioners encourage this Court to clarify that *O'Connor* requires considering *all* the circumstances in which the informal accommodation was made, including that:

- Lieutenant Duke was not a policymaker;
- the police department pagers were issued to facilitate SWAT team operations;
- the City had an official policy of no privacy in electronic communications;
- the public has high expectations of propriety in police departments; and
- there was a significant possibility of public disclosure under the California Public Records Act.

See Pet.16-20. Respondents ignore these salient circumstances and focus on only one circumstance: Lieutenant Duke's accommodation.

But that accommodation neither justifies the Ninth Circuit ordering summary judgment in plaintiffs' favor nor makes this case any less worthy of this Court's review. Respondents badly misread the petition by claiming that it "concedes" that the opinion's reliance on Lieutenant Duke's accommodation was a straightforward application of *O'Connor*. Opp.11. The petition – quite clearly – referred to only the following specific portion of the Ninth Circuit's reasoning as a straightforward application of *O'Connor*: that the Department had a written no-privacy policy for e-mail and computer use; that Sergeant Quon signed an acknowledgment of it; that he attended a meeting at which it was made clear that the policy fully applied to the pagers; and that, "[i]f that were all," the case unquestionably would be governed by the rule that employees have

no reasonable expectation of privacy where they have notice of employer policies permitting searches. Pet.16 (citing App.29).

Respondents also contend that there was no official policy governing the pagers. Opp.12. But this contention is both a fiction and a red herring. There is no meaningful factual dispute: as just explained, even the Ninth Circuit opinion acknowledges that Sergeant Quon attended the meeting where it was announced that the official no-privacy policy for electronic communications applied to the pagers. App.29. He was even copied on a written memorandum memorializing the announcement. SER 320, 463-64. Respondents' contention is also irrelevant because the Ninth Circuit opinion, as explained above, expressly proceeds on the basis that Sergeant Quon *was* informed that the official policy applied to the pagers. App.29. The problem is that the opinion then ignores the official policy, and all other circumstances, except for Lieutenant Duke's informal bill-paying procedure.

An accommodation for bill-paying purposes could not reasonably be interpreted by a SWAT team leader such as Sergeant Quon as affording a right to privacy in the text messages for all purposes and for all time subject only to his further consent. Notwithstanding Lieutenant Duke's accommodation, Sergeant Quon had no *reasonable* expectation of privacy (i.e., one that society is prepared to accept) vis-à-vis the police department in communications sent and received on

the Department-issued pager, especially while on duty.

In effect, the Ninth Circuit opinion affords Fourth Amendment protection to irresponsible plaintiffs' *un*reasonable expectations of privacy and thus encourages public employers to curtail any accommodations in electronic communications – even to employees who behave reasonably and have reasonable expectations of privacy – lest the employers end up liable for trying to improve their agencies' efficiency and safety. *See* Conforti, *supra*, at 486 ("If an Information Technology specialist or general manager gives employees the impression that the company will not actually conduct surveillance, then the employee may be found to have enjoyed a reasonable expectation of privacy that then limits how the employer may conduct a workplace search.").

Respondents also contend that Lieutenant Duke's accommodation makes this case unique and thus unworthy of this Court's review. Opp.11-12. Respondents have it backwards. Lieutenant Duke's accommodation and the Ninth Circuit's undue reliance on it are reasons for this Court to *grant* certiorari, not deny it. Fourth Amendment reasonableness analyses are inherently fact-specific. This Court cannot abdicate its responsibility to elucidate what is reasonable under the Fourth Amendment simply because each case presents a unique set of facts. Moreover, the question that warrants the Court's attention is not how courts should address situations where there is nothing mitigating an employer's

official, written no-privacy policy. After all, even the Ninth Circuit agreed Sergeant Quon's expectation of privacy would be foreclosed by existing case law were it not for Lieutenant Duke's accommodation. *See* App.29.

Rather, the question this Court needs to address is what happens when public employees seize on informal accommodations like Lieutenant Duke's bill-paying arrangement to try to expand expectations of privacy beyond those that society is prepared to recognize as reasonable. Government agencies are by nature large, bureaucratic institutions and undoubtedly many employ individuals trying to make accommodations like the one Lieutenant Duke made in this case. Under *O'Connor*, that should not create a *reasonable* expectation of privacy in communications made on government-owned equipment, especially when there is an official no-privacy policy.

This Court should review this case to restore a reasonableness standard to the *O'Connor* analysis.

C. The Opinion Overextends Fourth Amendment Protection To Individuals Who Lack Any Reasonable Expectation Of Privacy In Electronic Communications Sent To A Government Workplace.

The petition further established that the Ninth Circuit had no basis for its sweeping extension of Fourth Amendment protection to plaintiffs Trujillo, Florio, and Jerilyn Quon for messages they sent to

Sergeant Quon. Pet.28-33. Respondents offer only a series of unsupportable factual and legal quibbles.

Petitioners do not, as respondents contend, argue merely that the opinion reached the wrong result. Opp.13. Rather, respondents argue that the opinion utterly fails to account for the prevalence of employers' no-privacy policies and the fact that the three other plaintiffs knew they were sending messages to Sergeant Quon's Police Department-issued pager, not to a personal pager. Pet.28-29.

Respondents claim that petitioners offer no legal or factual support for the proposition that it is not objectively reasonable for someone to expect privacy in electronic communications sent to someone else's workplace. Opp.13. On the contrary, the petition provides factual and legal support, which respondents simply choose to ignore, that most employers, particularly government employers, have no-privacy policies that would apply to the recipient's workplace electronic communications, and hence any expectation of privacy on the part of the senders would be unreasonable. Pet.31-32.

Respondents also contend that the other three plaintiffs, like Sergeant Quon, reasonably could have relied on Lieutenant Duke's arrangement. Opp.14. This is another red herring. The opinion expressly relies on Lieutenant Duke's informal bill-paying accommodation only with respect to Sergeant Quon's expectation of privacy. App.27 n.6. It analyzes the other three plaintiffs' privacy expectations without

regard to whether they knew of Lieutenant Duke's accommodation. App.27-29. In any event, the opposition cites nothing in the record to support the contention that all three other plaintiffs knew of Lieutenant Duke's accommodation. Opp.14. The declarations of Jerilyn Quon and April Florio do not mention Lieutenant Duke. SER 303-04, 307-08. And, to the extent their expectation of privacy hinged on whether Sergeant Quon ultimately complied with Lieutenant Duke's arrangement by paying for overages, that could not constitute a *reasonable* expectation of privacy.

Likewise, in determining that the other plaintiffs had a reasonable expectation of privacy, the opinion does not mention their employment status. App.23-29. Both April Florio and Jerilyn Quon admitted that they used their own personal pagers to send messages to Sergeant Quon. SER 303, 307. And respondents cite nothing in the record to indicate that Lieutenant Duke informed staff who did not even receive Department-issued pagers of the bill-paying accommodation that he made for SWAT team members who did receive Department-issued pagers. Opp.14.

Lastly, respondents argue that these plaintiffs' privacy expectations were supported by the Stored Communications Act ("SCA"). Opp.15. But plaintiffs had no objectively reasonable basis not to expect Arch Wireless to provide copies of their text messages to the Department. They did not know how Arch Wireless's service worked – for example, that Arch

Wireless archived copies of the messages. *See* App.3; SER 303-04, ¶4 (Florio: "It never occurred to me that the transcripts of the messages were saved anywhere by Arch Wireless or that they could be accessed."); SER 307-08, ¶4 (Jerilyn Quon: "I had no reason to believe that transcripts of the messages were saved anywhere by Arch Wireless or that they could be accessed."). The opinion reasons that under the SCA the Department's right to obtain those copies depended on whether the relevant service provided by Arch Wireless was a "remote computing service" or an "electronic communication service." App.13-20. But when plaintiffs sent text messages to Sergeant Quon in 2002, they could have had no reasonable expectation one way or the other – after all, the district court and the Ninth Circuit reached opposite conclusions four and six years later. App.20, 80.

In short, respondents cannot support the Ninth Circuit's sweeping, categorical extension of Fourth Amendment rights to individuals sending electronic communications to a government workplace. That ruling hampers public agencies' ability to monitor employees' workplace electronic communications and provides yet another reason to grant certiorari.

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CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted or the Ninth Circuit opinion should be summarily reversed.

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AMICUS CURIAE BRIEF

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Respondents.

On Petition For A Writ Of *Certiorari* To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE LEAGUE OF CALIFORNIA CITIES AND CALIFORNIA STATE ASSOCIATION OF COUNTIES, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS CITY OF ONTARIO, ONTARIO POLICE DEPARTMENT, AND LLOYD SCHARF

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BRIEF ON BEHALF OF THE LEAGUE OF CALIFORNIA CITIES AND THE CALIFORNIA STATE ASSOCIATION OF COUNTIES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

The League of California Cities and California State Association of Counties respectfully submit this brief as *amici curiae* in support of Petitioners.

INTERESTS OF *AMICI CURIAE*[1]

The League of California Cities (League) is an association of 480 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, which is comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that are of statewide – or nationwide – significance. The Committee has identified this case as being of such significance.

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[1] Pursuant to Rule 37.2(a) of the Rules of the Supreme Court of the United States, *amici curiae* provided at least ten days' notice of their intent to file this brief to counsel of record for all parties. The parties have consented to the filing of this brief. Pursuant to this Court's Rule 37.6, this brief was not authored in whole or in part by counsel for any party, and no person or entity other than the *amici curiae* made a monetary contribution to this brief's preparation or submission.

The California State Association of Counties (CSAC) is a non-profit corporation with membership consisting of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsel's Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

The *amici*, as representatives of local public entities throughout California, have a vital interest in ensuring that their employees use municipal electronic equipment for proper purposes in order to avoid taxpayer rancor and municipal liability. If allowed to stand, the Ninth Circuit decision in this case, and its legal analysis, is likely to have significant adverse impacts on municipalities' ability to enforce written policies regarding use of government-issued equipment.

SUMMARY OF ARGUMENT

The City of Ontario has a written policy governing the use of City computers, the Internet and email, which covers the use of City pagers. In spite of this written policy, the Ninth Circuit held that Sergeant Jeff Quon, an Ontario SWAT officer, had a reasonable expectation of privacy in the text messages archived

for the City by its wireless service provider. The holding was based on an informal accounting practice that the pager account manager initiated to address text character limits in the pager contract. If an officer exceeded the monthly character limit on the plan, the account manager simply collected the cost of the overage from the officer. This procedure eliminated the need to audit the text messages, separate the work-related and personal messages, and then bill the officer for all of the personal messages. The Ninth Circuit concluded that this accounting practice created an expectation of privacy in the text messages, despite the formal written policy. But this holding directly contradicts this Court's Fourth Amendment jurisprudence that no reasonable expectation of privacy exists where a government employer has a policy discouraging personal use of the area searched.

At most, the informal billing practice here created a subjective expectation of privacy for Sergeant Quon. But the operational realities of the police department made any subjective expectation of privacy in those messages unreasonable. These policies included the written policy, the potential the text messages could be subject to public disclosure pursuant to a public records request, and the fact that the text messages were sent to and archived by a third party and Quon had no access to the messages once he sent them.

ARGUMENT

In addition to the reasons set forth in the Petitioners' Petition for a Writ of *Certiorari* (Petition), the following is of particular importance to the *amici curiae* due to its impact on government agencies at all levels:

I. THIS COURT'S REVIEW WOULD PROVIDE GUIDANCE ON THE ISSUES LEFT UNRESOLVED IN THE *O'CONNOR* PLURALITY DECISION

This Court's opinion in *O'Connor v. Ortega,* 480 U.S. 709, 107 S.Ct. 1492, 94 L.Ed.2d 714 (1987), because it was a plurality decision, left unresolved the issues of the extent to which the "special needs" exception applies to government employees and the proper test to apply to work-related searches conducted by a government employer. Four members of this Court found the government employee had a reasonable expectation of privacy in the area searched, but that the search was still reasonable. Justice Scalia agreed with the plurality that the search was reasonable, but he disagreed with the reasoning and the standard articulated. He took issue with the standard that requires a case-by-case analysis because such a standard creates uncertainty for police and government employers. He would have found that "special needs" exist in the context of a government employer conducting searches to retrieve work-related materials or investigate violations of workplace rules. The result would be eliminating the

distinction between private and public employers for non-criminal work-related searches.

Because no rule emerged from *O'Connor*, lower courts such as the Ninth Circuit here, have had little guidance on how to apply the Fourth Amendment reasonableness analysis in the government employment context. This case presents an opportunity to revisit the issues that this Court sought to resolve in *O'Connor*.

II. REVIEW WOULD CLARIFY HOW TO APPLY THE "OPERATIONAL REALITIES OF THE WORKPLACE" STANDARD IN A GOVERNMENT EMPLOYMENT CONTEXT

The Justices in *O'Connor* agreed that some consideration of the operational realities of government employment conditions is appropriate in the Fourth Amendment analysis, but reached no consensus on how to apply the inquiry for public employers.

A. The Ninth Circuit Mischaracterizes the Relevant "Operational Realities" of Government Employers, Including the Significance of the California Public Records Act, in the Reasonableness Analysis

The Ninth Circuit completely dismisses as irrelevant to the Fourth Amendment inquiry the fact that the text messages could be subject to public disclosure under the California Public Records Act

(CPRA). Cal. Gov't Code §§ 6250-6270 (West 2008). Under the CPRA, public agencies must make their records available to the public upon request, unless the records are exempt from disclosure. Public records include "any writing containing information relating to the conduct of the public's business" that the public agency has prepared, uses or retains. Cal. Gov't Code § 6252, subd. (e) (West 2008). The CPRA defines "writing" very broadly, and includes emails, faxes and any other means of recording a communication. Cal. Gov't Code § 6252, subd. (g) (West 2008). In 2003, the California voters passed Proposition 59 (Cal. Const. art. I, § 3, subd. (b)), which added the State's policy regarding disclosure of public records to the California Constitution. It provides, "(b)(1) The people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny." Cal. Const. art. I, § 3, subd. (b)(1). Statutes and court orders must be construed broadly in favor of disclosure of public records. Cal. Const. art. I, § 3, subd. (b)(2). Moreover, if a public agency fails to disclose a public record that is subject to disclosure, the CPRA *requires* the court to award attorneys' fees to the requester in any action in which a court finds the government failed to comply with the CPRA. Cal. Gov't Code § 6259, subd. (d) (West 2008).

The operational realities of municipalities in California include a constant need to process public

records requests. Indeed, local police departments in California routinely receive and respond to CPRA requests. Inquiries often focus on fiscal issues, such as officer salaries and overtime pay. Some requests relate to a particular officer or incident, especially when the incident is considered newsworthy. In a large city such as Los Angeles or Oakland, these requests can consume considerable police staff time.

Despite the clear disclosure mandates of the CPRA and the real impact of the CPRA on police department operations, both the district court and the Ninth Circuit found the CPRA had no significant impact on the reasonableness of Quon's privacy expectation. The Ninth Circuit found that there was no "evidence" before the court "suggesting that CPRA requests to the department are . . . widespread or frequent." *Quon v. Arch Wireless Operating Company, Inc.*, 529 F.3d 892, 907-908 (9th Cir. 2008), Petitioners' Appendix (Pet. App.) at 31-32. Thus, the possibility of a CPRA request was too "hypothetical" to undermine a public employee's expectation of privacy. *Id.*

But as the dissent in the denial of rehearing and denial of rehearing *en banc* correctly noted:

> Given that the pagers were issued for use in SWAT activities, which by their nature are highly charged, highly visible situations, it is unreasonable to expect that messages sent on pagers provided for communications among SWAT team members during those emergencies would not be subsequently reviewed by

> an investigating board, subjected to discovery in litigation arising from the incidents, or requested by the media. *Quon v. Arch Wireless Operating Company, Inc.*, 554 F.3d 769, 776, denial of rehearing and rehearing *en banc* (9th Cir. 2009), Pet. App. at 142 (dissenting opinion of Ikuta).

The dissent accurately portrays the "operational realities" involved here.

In fact, just months after the *Quon* decision was published, another published case discussed a public records request from the Detroit Free Press for police pager text messages. *Flagg v. City of Detroit*, 252 F.R.D. 346 (E.D. Mich., So. Div., 2008). There, the plaintiff was seeking discovery of the pager text messages in a civil lawsuit. While the case was pending, the Detroit Free Press sought disclosure of the text messages from the City of Detroit's wireless service provider. *Id.*, at 348. The court granted the Detroit Free Press leave to file an *amicus* brief in the civil suit because the court determined that the resolution of the discovery issue was likely to impact the Detroit Free Press lawsuit. *Ibid.* The Eastern District of Michigan noted, "[t]here is no question . . . that at least some of the SkyTel text messages satisfy the statutory definition of 'public records,' insofar as they capture communications among City officials or employees 'in the performance of an official function.'" *Id.*, at 355. Consequently, in a case decided just two months after *Quon*, a public records request of the type the Ninth Circuit dismissed as "hypothetical"

occurred with the same type of record at issue here. Even the sexually-explicit messages sent by Quon might be the subject of a CPRA request where, for instance, a member of the public was seeking to determine whether public money was being spent on the salary of a public employee who was not doing his job.[2]

B. Because of the Operational Realities of Using a Pager System, the Text Messages Were Not in Quon's Control, So He Could Not Have a Reasonable Expectation of Privacy in Them

As noted in *Smith v. Maryland*, "[t]his Court consistently has held that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." *Smith v. Maryland*, 442 U.S. 735, 743-744, 99 S.Ct. 2577, 2582, 61 L.Ed.2d 220 (1979). Thus, where a person "exposes" his information to a third-party, such as a telephone company, he assumes the risk that the company will reveal the information to the police. *Id.*, at 744, 99 S.Ct., at 2582, quoting *United States v. Miller*, 425 U.S. 435, 443, 96 S.Ct. 1619, 1624, 48 L.Ed.2d 71 (1976). As the Second Circuit found, although individuals do generally have a reasonable expectation of privacy in their

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[2] It should be noted that a CPRA request analysis is complex and involves exceptions that must be reviewed on a case-by-case basis. A full discussion of the disclosure analysis is beyond the scope of this brief.

home computers, "[t]hey may not, however, enjoy such an expectation of privacy in transmissions over the Internet or e-mail that have already arrived at the recipient." *United States v. Lifshitz*, 369 F.3d 173, 190 (2nd Cir. 2004).

In a case involving pager text, the court noted that "all messages are recorded and stored not because anyone is 'tapping' the system, but simply because that's how the system works. It is an integral part of the technology." *Lifshitz, supra*, 369 F.3d, at 190. Similarly here, the pager system that the City of Ontario used involved text messages being sent to Arch Wireless, where they were held temporarily until receiving pagers were ready to receive them. *Quon, supra,* 529 F.3d, at 895-896, Pet. App. at 3-4. Once conveyed, the messages were archived in the Arch Wireless system. *Quon, supra,* 529 F.3d, at 896, Pet. App. at 3. At no time during the transmission or storage were the messages in either Quon's or the City's control. *Quon v. Arch Wireless Operating Company, Inc.*, 445 F.Supp.2d 1116, 1131 (C.D. Cal. 2006), Pet. App. at 65. Consequently, Quon had no reasonable expectation of privacy in those communications.

The Ninth Circuit's decision also ignored the operational realities of government agencies in its interpretation of the Stored Communications Act (SCA). 18 U.S.C. §§ 2701-2711. The court erroneously held that the City's wireless service provider acted exclusively as an electronic communications service (ECS) (18 U.S.C. § 2510(15)) and not a remote computing service (RCS) (18 U.S.C. § 2711(2)) under the SCA. 18

U.S.C. §§ 2701-2711. While this fact bears mainly on Arch Wireless' liability, it also has implications on the reasonableness of Quon's expectation of privacy.

An ECS provides "temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof" and storage of such communication for backup purposes. 18 U.S.C. § 2510(17). In contrast, an RCS provides long term storage, or "archiving," of electronic communications. 18 U.S.C. § 2510(14). Under the SCA, unless an exception exists, an ECS may not knowingly disclose the contents of a customer's communication while in electronic storage, except to the sender or recipient.[3] 18 U.S.C. § 2702(a)(1). But, an RCS may disclose the communication to the subscriber as well. 18 U.S.C. § 2702(b)(3).

Both the district court here and the Eastern District of Michigan found that wireless service providers such as Arch Wireless, that provide electronic pager text services, function as both an ECS and an RCS. *Quon, supra*, 445 F.Supp.2d, at 1137, Pet. App. at 80; *Flagg, supra*, 252 F.R.D., at 362-363. This conclusion makes sense because a text message that gets sent to the wireless service provider must stay in temporary storage while waiting for the receiving device to accept the message. *Quon, supra,* 529 F.3d, at 895-896,

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[3] Although there are other exceptions to disclosure, it is beyond the scope of this brief to discuss them because they were not raised in the lower court.

Pet. App. at 3-4. At this stage, the service is acting as an ECS. *Quon, supra,* 445 F.Supp.2d, at 1137, Pet. App. at 80. But when the messages get archived, as they were here, the service provider is acting as an RCS – providing long-term storage. *Ibid.*

Had the Ninth Circuit correctly concluded that Arch Wireless was acting as an RCS in archiving the text messages at issue, Quon could not have a reasonable expectation of privacy in those messages. Under the SCA, the City, as the subscriber, would have access to the archived messages. 18 U.S.C. § 2702(b)(3). In fact, *only* the City would have had such access pursuant to the terms of the contract with Arch Wireless. *Quon, supra,* 529 F.3d, at 898, Pet. App. at 8-9. As the account representative for Arch Wireless stated, she "would only deliver messages to the 'contact' on the account, and . . . she would not deliver messages to the 'user' unless he was also the contact on the account." *Quon, supra,* 529 F.3d, at 898, Pet. App. at 9. The contact here was the City. Accordingly, Quon could not have a reasonable expectation of privacy in messages he could not even access.

The Ninth Circuit's finding that Arch Wireless is an ECS also has serious practical ramifications on a governmental agency's ability to access its own records. If third-party wireless service companies that provide pager text messaging services are ECS's, government agency subscribers cannot access their archived text messages absent consent of the sender or recipient of the messages or a search warrant. But,

as the court in *Flagg* noted, "it is difficult to see how an archive of text messages would be of any use or value to a customer if the service provider did not also offer a mechanism for retrieving messages from this archive." *Flagg, supra,* 252 F.R.D., at 359. The Ninth Circuit's reasoning results in a government agency contracting and paying for an archiving and retrieval service, but having no access to the records in the archive.

C. Based On the Operational Realities of a Police Department, A Written and Signed Department Policy Governing the Use of Electronic Equipment and Communications Makes Any Expectation of Privacy in the Equipment or Communications *Per Se* Unreasonable

The Fourth Amendment does not protect subjective expectations of privacy. *United States v. Jacobsen*, 466 U.S. 109, 122, 104 S.Ct. 1652, 1661, 80 L.Ed.2d 85 (1984). Rather, the Fourth Amendment only protects expectations of privacy that society is prepared to consider reasonable. *Id.*, at 113, 104 S.Ct., at 1656. Thus, a legitimate expectation of privacy means more than a subjective expectation of not being discovered. *Id.*, at fn. 22.

Here, the City of Ontario had a written policy specifically stating that only light personal use of the City's computer-related equipment was permitted. Pet. App. at 152-153. The policy further provided that the City reserved the right to monitor all network

activity, email, and Internet use without notice and that "[u]sers should have no expectation of privacy or confidentiality when using these resources." Pet. App. at 152-153. The policy also prohibited "[t]he use of inappropriate, derogatory, obscene, suggestive, defamatory, or harassing language" through the City's email system. Pet. App. at 153.

The Ninth Circuit acknowledged the existence of the policy. The court even noted that Quon signed the policy and attended a meeting at which Quon was present, where the department told the SWAT officers the policy applied to the pagers. *Quon, supra*, 529 F.3d, at 906, Pet. App. at 29. Subsequently, the Ninth Circuit inexplicably stated, "the City had no official policy expressly governing the use of the pagers." *Quon, supra,* 529 F.3d, at 897, Pet. App. at 6; *see also, Quon, supra,* 554 F.3d, at 770, denial of rehearing and rehearing *en banc*, Pet. App. at 127 (reiterating the incorrect statement that "the record is clear that the City had no official policy governing the use of the pagers.") Based on this erroneous assertion, the Ninth Circuit then found that the informal practice initiated by Lieutenant Duke to streamline the accounting functions for the City-issued pagers, created an expectation of privacy in the text messages. *Quon, supra,* 529 F.3d, at 907, Pet. App. at 31. But the court's conclusion ignores the operational realities of a police department or any governmental agency. To function smoothly, government employers must create policies that apply to employees consistently across all departments. It was unreasonable for Quon to believe that Lieutenant Duke, a non-policy-making

employee, who was not Quon's supervisor, had the authority to create a policy that contradicted the city-wide electronic equipment policy. Accordingly, at most, Lieutenant Duke's informal procedure created a subjective, not a reasonable, expectation that the content of Quon's personal messages would not be revealed.

Whether an expectation of privacy is reasonable also depends on the steps taken to ensure privacy and the extent of control the person exercised over the place searched. *See, e.g., Katz v. United States*, 389 U.S. 347, 351-352, 88 S.Ct. 507, 511-512, 19 L.Ed.2d 576 (1967). Here, Quon had no control over the text messages after he sent them. In fact, as noted above, he could not even access the messages at all once they were sent. Consequently, Quon had no ability to ensure the privacy of his text messages.

If this opinion stands, government employers will lose their ability to oversee the use of their electronic equipment. An informal practice of any low-level government employee will override long-standing, formal, written and signed policies addressing use and privacy expectations with respect to electronic equipment and communications – even those adopted formally by their governing bodies. The Ninth Circuit's decision here eviscerates oversight of government employees and "improperly hobbles government employers from managing their workforces." *Quon, supra*, 554 F.3d, at 774, denial of rehearing and rehearing *en banc*, Pet. App. at 137 (dissenting opinion of Ikuta).

CONCLUSION

This case presents the Court with an opportunity to provide a clear rule on the reasonableness standard in the government employment context left unresolved in *O'Connor*. Such a rule is needed at this time because the existing operational realities for government employers include the constant need to access their offices, file cabinets and electronically-stored information. Without this Court's guidance on what constitutes a reasonable search for routine employment operations and non-criminal investigations, government employers potentially face employee lawsuits any time they go into an employee's office to retrieve a file.

Dated: May 29, 2009

Respectfully submitted,

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JOINT APPENDIX

No. 08-1332

In The
Supreme Court of the United States

CITY OF ONTARIO, CALIFORNIA, ONTARIO POLICE DEPARTMENT, and LLOYD SCHARF,

Petitioners,

v.

JEFF QUON, JERILYN QUON, APRIL FLORIO, and STEVE TRUJILLO,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT APPENDIX

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CENTRAL DISTRICT OF CALIFORNIA
(Eastern Division – Riverside)
Case No. 5:03-cv-00199-SGL-OP

Date	#	Docket Text
02/25/2003	1	COMPLAINT filed Summons(es) Issd referred to Discovery Stephen G. Larson; Demand for jury trial (am) (Entered: 02/26/2003)
03/11/2003	3	FIRST AMENDED COMPLAINT [1-1] by plaintiff Jeff Quon, plaintiff Jerilyn Quon, plaintiff April Florio, plaintiff Doreen Klein, plaintiff Steve Trujillo; jury demand. Summons (am) (Entered: 03/12/2003)
05/06/2003	20	SECOND AMENDED COMPLAINT [3-1] by plaintiffs Jeff Quon, Jerilyn Quon, April Florio, Doreen Klein, Steve Trujillo, Roes; jury demand. (am) (Entered: 05/08/2003)
05/21/2003	21	ANSWER filed by defendant Ontario City of, defendant Lloyd Scharf to 2nd amended complaint [20-1]; jury demand (am) (Entered: 05/22/2003)
04/12/2004	37	ANSWER to Second Amended Complaint 20 with Demand for jury trial, CROSSCLAIM against ROES, Ontario Police Department, Ontario City of ; Demand for jury trial, filed

		by defendant Arch Wireless Incorporated.(am,) (Entered: 04/13/2004)
10/08/2004	42	NOTICE OF MOTION AND MOTION for Summary Judgment alternative MOTION for Summary Adjudication of claims or issues as to plaintiff Jerilyn Quon; memorandum of points and authorities; filed by defendants Ontario City of, Lloyd Scharf. Motion set for hearing on 11/8/2004 at 10:00 AM before Honorable Robert J. Timlin. Lodged Proposed Statement. (am,) (Entered: 10/13/2004)
10/08/2004	43	NOTICE OF MOTION AND MOTION for Summary Judgment alternative MOTION for Summary Adjudication of claims or issues as to plaintiff Doreen Klein; memorandum of points and authorities; filed by defendants Ontario City of, Lloyd Scharf. Motion set for hearing on 11/8/2004 at 10:00 AM before Honorable Robert J. Timlin. Lodged Proposed Statement. (am,) (Entered: 10/13/2004)
10/08/2004	44	NOTICE OF MOTION AND MOTION for Summary Judgment alternative MOTION for Summary Adjudication of claims or issues as to plaintiff Steve Trujillo; memorandum of points and authorities; filed by defendants Ontario City of,

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10/08/2004 45 NOTICE OF MOTION AND MOTION for Summary Judgment alternative MOTION for Summary Adjudication of claims or issues as to plaintiff Jeff Quon; memorandum of points and authorities; filed by defendants Ontario City of, Ontario Police Department, Lloyd Scharf. Motion set for hearing on 11/8/2004 at 10:00 AM before Honorable Robert J. Timlin. Lodged Proposed Statement. (am,) (Entered: 10/13/2004)

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10/08/2004 48 EXHIBIT Filed filed [sic] by Defendants Ontario City of, Ontario Police Department, Defendant Lloyd Scharf. in support of MOTION for Summary Judgement or in the alternative MOTION for Summary Adjudication 46, 42, 43, 44, 45 . (am,) (Entered: 10/13/2004)

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03/14/2005 63 NOTICE OF MOTION AND MOTION for Partial Summary Judgment as to liability only or in the alternative Partial Summary Adjudication of claims or issues as to defendant Arch Wireless Inc; Memorandum of points an[d] authorities in support thereof, filed by plaintiffs Jeff Quon, Jerilyn Quon, April Florio, Doreen Klein, Steve Trujillo. Motion set for hearing on 4/25/2005 at 10:00 AM before Honorable Robert J. Timlin. Lodged

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03/14/2005 64 INDEX OF EXHIBIT Filed filed [sic] by Plaintiffs Jeff Quon, Jerilyn Quon, April Florio, Doreen Klein, Steve Trujillo. in support MOTION for Partial Summary Judgmentagainst [sic] A[r]ch Wireless 63 . (am,) (Entered: 03/16/2005)

04/08/2005 70 STIPULATION AND ORDER by Judge Robert J. Timlin: as to all pending MOTIONS for Summary Judgment 45, 63, 46, 50, 51, 52, 53, 54, 55, 56, 57, 42, 58, 43, 59, 44.Motions continued for hearing on 5/16/2005 at 10:00 AM before Honorable Robert J. Timlin, and that the briefing schedule for Oppositions and Replies will be recalculated according to the new hearing date.(am,) (Entered: 04/11/2005)

04/22/2005 71 MINUTES OF IN CHAMBERS ORDER by Judge Robert J. Timlin: DENYING without prejudice defendants City of Ontario and Lloyd Scharf, Debbie Glenn, and Arch Wireless MOTIONS for Summary Judgment 55, 50, 56, 57, 46, 42, 51, 52, 53, 54, 58, 59, 43, 44, 45 (am,) (Entered: 04/26/2005)

06/08/2005 88 CONSENT TO PROCEED before Magistrate Judge, ALL PARTIES having consented in accordance

		with Title 28 Section 636(c) and F.R.CIV.P. 73(b) filed by plaintiffs and defendants. Case reassigned to Magistrate Judge Stephen G. Larson for final disposition. Any appeal shall be taken before the 9th Circuit Court of Appeals. (am,) Modified on 6/8/2005 (am,). (Entered: 06/08/2005)
10/03/2005	94	BRIEF FILEDre [sic] suggested procedure for filing and hearing motions for summary judgment filed by plaintiffs Jeff Quon, Jerilyn Quon, April Florio, Doreen Klein, Steve Trujillo. (am,) (Entered: 10/04/2005)
10/25/2005	95	MINUTE ORDER by Judge Stephen G. Larson, re Suggested Procedure for Filing and Hearing Motions for Summary Judgment: Plaintiffs are Ordered to re-notice their existing motion for summary judgment for a hearing before the Court. With respect to the defendants, the Court grants defendants leave to file a singular, joint motion for summary judgment not to exceed 40 pages in length; plaintiff's opposition thereto shall not exceed 35 pages in length. Counsel for the parties are Ordered to meet and confer within 3 days from the date of this Order to agree to a mutually-convenient date for a hearing on the motions that is also

available on the Court's calendar. (dts) (Entered: 10/26/2005)

01/03/2006 98 NOTICE OF MOTION AND MOTION for Summary Judgment or in the alternative, MOTION for Summary Adjudication of Claims filed by defendants Debbie Glenn, Ontario Police Department, Arch Wireless Incorporated, Ontario City of, Lloyd Scharf. Motion set for hearing on 1/30/2006 at 03:00 PM before Magistrate Judge Stephen G. Larson. (mrgo,) (Entered: 01/04/2006)

01/03/2006 99 STATEMENT of UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW in support of defendants' MOTION for Summary Adjudication and MOTION for Summary Judgment 98 filed by defendants Debbie Glenn, Ontario Police Department, Arch Wireless Incorporated, Ontario City of, Lloyd Scharf. (mrgo,) (Entered: 01/04/2006)

01/03/2006 100 EXHIBITS in support of defendants' MOTION for Summary Adjudication and MOTION for Summary Judgment 98 filed by defendants Debbie Glenn, Ontario Police Department, Arch Wireless Incorporated, Ontario City of, Lloyd Scharf. (mrgo,) (Entered: 01/04/2006)

01/03/2006 101 AFFIDAVITS of Laura Stephan, Lloyd Scharf, Steve Duke, Martin Thouvenell, Steve Filarsky, Jason [C]ole and Steven Nickamp in support of defendants' MOTION for Summary Adjudication and MOTION for Summary Judgment 98 filed by defendants Debbie Glenn, Ontario Police Department, Arch Wireless Incorporated, Ontario City of, Lloyd Scharf. (mrgo,) (Entered: 01/04/2006)

01/03/2006 102 CALIFORNIA STATE CASE LAW AND STATUTES in support of defendants' MOTION for Summary Adjudication and MOTION for Summary Judgment 98 filed by defendants Debbie Glenn, Ontario Police Department, Arch Wireless Incorporated, Ontario City of, Lloyd Scharf. (mrgo,) (Entered: 01/04/2006)

01/04/2006 103 RE-NOTICE of Motion filed by Plaintiffs Jeff Quon, Jerilyn Quon, April Florio, Doreen Klein, Steve Trujillo re MOTION for Summary Adjudication MOTION for Summary Judgment 98 : Motion set for hearing on 1/30/2006 at 03:00 PM before Magistrate Judge Stephen G. Larson. (mrgo,) (Entered: 01/05/2006)

01/31/2006 106 STATEMENT of DISPUTED FACTS AND CONCLUSIONS OF LAW in opposition to defendants' MOTION for Summary Adjudication and MOTION for Summary Judgment

98 filed by plaintiffs Jeff Quon, Jerilyn Quon, April Florio, Doreen Klein, Steve Trujillo. (mrgo,) (Entered: 02/01/2006)

01/31/2006 107 DECLARATION of Michael A Morguess, April Florio, Jeff Quon and Jerilyn Quon in support of plaintiffs' opposition to defendants' MOTION for Summary Adjudication and MOTION for Summary Judgment 98 filed by plaintiffs Jeff Quon, Jerilyn Quon, April Florio, Doreen Klein, Steve Trujillo. (mrgo,) (Entered: 02/01/2006)

01/31/2006 108 OPPOSITION to defendants' MOTION for Summary Adjudication and MOTION for Summary Judgment 98 filed by plaintiffs Jeff Quon, Jerilyn Quon, April Florio, Doreen Klein, Steve Trujillo. (mrgo,) (Entered: 02/01/2006)

01/31/2006 109 INDEX OF EXHIBITS in support of opposition to defendants' MOTION for Summary Adjudication and MOTION for Summary Judgment 98 filed by plaintiffs Jeff Quon, Jerilyn Quon, April Florio, Doreen Klein, Steve Trujillo. (mrgo,) (Entered: 02/01/2006)

02/06/2006	111	REPLY in support of MOTION for Partial Summary Judgment 63 ; Memorandum of p[o]ints and authorities filed by plaintiffs Jeff Quon, Jerilyn Quon, April Florio, Doreen Klein, Steve Trujillo. (am,) (Entered: 02/08/2006)
02/06/2006	112	REPLY STATEMENT of disputed facts and conclus[ions] of law in support of MOTION for Partial Summary Judgment 63 filed by plaintiffs Jeff Quon, Jerilyn Quon, April Florio, Doreen Klein, Steve Trujillo. (am,) (Entered: 02/08/2006)
02/06/2006	113	REPLY to plaintiffs opposition to MOTION for Summary Judgment 98 filed by defendants Ontario Police Department, Ontario City of, Lloyd Scharf. (am,) (Entered: 02/08/2006)
02/27/2006	115	MINUTES OF Motion Hearing held before Judge Stephen G. Larson: RE: Defendants MOTION for Summary Judgment or in the alternative Summary Judgment of Claims 98 ; Plaintiffs MOTION [fo]r Summary Judgment or alternatively for Partial Summary Adjudication of Claims or Issues: Court hears oral argument and take the matter under submission. (am,) (Entered: 03/06/2006)

03/08/2006	116	ORDER by Judge Stephen G. Larson GRANTING in part and DENYING in part defendants' MOTION for Summary Judgment 98, and DENYING plaintiffs Motion for partial summary judgment 103 . (See document for specifics)(mrgo,) (Entered: 03/09/2006)
04/07/2006	118	NOTICE OF MOTION AND MOTION for Judgment on the Pleadings filed by defendants Ontario Police Department, Ontario City of, Lloyd Scharf. Motion set for hearing on 5/1/2006 at 10:00 AM before Judge Stephen G. Larson. (am,) (Entered: 04/11/2006)
05/22/2006	130	NOTICE OF MOTION AND MOTION for Judgment on the Pleadings filed by plaintiffs Jeff Quon, Jerilyn Quon, April Florio, Doreen Klein. Motion set for hearing on 6/12/2006 at 10:00 AM before Judge Stephen G. Larson. (am,) (Entered: 05/25/2006)
05/26/2006	132	OPPOSITION to defendants Ontario and Scharf's MOTION for Judgment on the Pleadings 118 ; Memorandum of points and authorities filed by plaintiffs Jeff Quon, Jerilyn Quon, April Florio, Doreen Klein, Steve Trujillo. (am,) (Entered: 05/30/2006)

05/30/2006	135	OPPOSITION to MOTION for Judgment on the Pleadings 130 ; Memorandum of points and authorities filed by defendants Ontario Police Department, Ontario City of, Lloyd Scharf. (am,) (Entered: 05/31/2006)
06/02/2006	137	REPLY to opposition to MOTION for Judgment on the Pleadings 130 filed by defendants Ontario Police Department, Ontario City of, Lloyd Scharf. (mrgo,) (Entered: 06/07/2006)
06/05/2006	138	REPLY to defendants opposition to plaintiffs MOTION for Judgment on the Pleadings 130 filed by plaintiffs Jeff Quon, Jerilyn Quon, April Florio, Doreen Klein, Steve Trujillo. (mrgo,) (Entered: 06/07/2006)
06/26/2006	143	MINUTES OF Motion Hearing held before Judge Stephen G. Larson: RE: Defendants MOTION for Judgment on the Pleadings 120, MOTION for Judgment on the Pleadings 130, MOTION for Judgment on the Pleadings 118, MOTION for Judgment on the Pleadings 128 . Court hears oral argument and takes the matter under submission. Court Reporter: Theresa Lanza. (am,) (Entered: 06/30/2006)

06/27/2006 142 (IN CHAMBERS)ORDER CONVERTING PENDING MOTIONS FOR JUDGMENT ON THE PLEADINGS TO MOTIONS FOR SUMMARY JUDGMENT; ORDER GRANTING LEAVE TO SUBMIT ADDITIONAL EVIDENCE: As it is apparent that the parties wish for the Court to consider matters outside the pleadings themselves, the Court will treat the parties' motions as ones for summary judgment. In light of this construction of the present motions, the parties are hereby given the opportunity to submit to the Court, within seven (7) days from the date this Order is entered, additional evidentiary material (not supplemental briefs or argument) pertinent to their motions under Rule 56. Moreover, in considering what material to submit, the parties are further advised that the Court will consider in passing on the merits of the present motions the material already submitted by the parties in conjunction with their earlier cross-motions for summary judgment. Therefore, the parties should only produce, if they wish to do so, evidence not previously submitted to the Court in conjunction with the previous motions for summary judgment.(see Minute Order for full

text) IT IS SO ORDERED. [RE: MOTION for Judgment on the Pleadings 120, MOTION for Judgment on the Pleadings 130, MOTION for Judgment on the Pleadings 118, MOTION for Judgment on the Pleadings 128, IN CHAMBERS ORDER held before Judge Stephen G. Larson] Court Reporter: none. (jh,) (Entered: 06/28/2006)

07/03/2006 144 SUPPLEMENTAL SUBMISSION OF EVIDENCE Filed filed [sic] by Defendant Debbie Glenn. (am,) (Entered: 07/05/2006)

07/03/2006 145 AFFIDAVIT OF Patrick McMahon filed by defendants City of Ontario, Ontario Police Department and Lloyd Scharf. (vc,) (Entered: 07/06/2006)

07/03/2006 147 ADDITIONAL EXHIBITS in support of MOTION for Summary Judgment 98 filed by defendants Ontario Police Department, Ontario City of, Lloyd Scharf. (am,) (Entered: 07/07/2006)

07/05/2006 146 NOTICE of Filing of Court's Order Granting in part and Denying in part defendants Motion for Summary Judgment; and Denying Plaintiffs Motion for Partial Summary Judgment filed by defendant Arch Wireless Incorporated. (am,)

Modified on 7/11/2006 (am,). (Entered: 07/07/2006)

07/05/2006 148 SUPPLEMENTAL EVIDENCE in support of MOTION for Judgment on the Pleadings/Summary Judgment 130 filed by plaintiffs Jeff Quon, Jerilyn Quon, April Florio, Doreen Klein, Steve Trujillo. (am,) (Entered: 07/07/2006)

07/07/2006 149 CORRECTED SUPPLEMENTAL EVIDENCE in support of MOTION for Judgment on the Pleadings/ Summary Judgment 130 filed by plaintiff Jeff Quon, Jerilyn Quon, April Florio, Doreen Klein, Steve Trujillo. (am,) (Entered: 07/10/2006)

08/15/2006 151 AMENDED ORDER by Judge Stephen G. Larson GRANTING in part and DENYING in part Defendants' Motions for Summary Judgment, and DENYING plaintiffs' Motions for Summary Judgment. See order for full text of ruling/ decision. Per the parties' stipulation and the Court's order entered on July 18, 2006, the Pretrial Conference in this case is scheduled for October 23, 2006, at 11:00 a.m., and Trial is scheduled for November 7, 2006, at 9:00 a.m. [re MOTION for Judgment on the Pleadings 118, Notice of Hearing on Motion, 103, Joinder (non-motion) 129, MOTION

for Judgment on the Pleadings 130, MOTION for Judgment on the Pleadings 128, Notice of Motion 123, MOTION for Judgment on the Pleadings 120 (jh,) (Entered: 08/15/2006)

09/12/2006 152 NOTICE OF MOTION AND MOTION to Certify Appeal pursuant to 28 USC 1292; Memorandum of points and authorities filed by defendants Ontario Police Department, Ontario City of, Lloyd Scharf. Motion set for hearing on 10/30/2006 at 10:00 AM before Judge Stephen G. Larson. Lodged Proposed Order. (am,) (Entered: 09/13/2006)

09/12/2006 153 NOTICE OF MOTION AND MOTION to Certify Appeal pursuant to 28 USC 1292; Memorandum of po[i]nts and authorities filed by defendants Ontario Police Department, Ontario City of, Lloyd Scharf. Motion set for hearing on 10/30/2006 at 10:00 AM before Judge Stephen G. Larson. Lodged Proposed Order. (am,) (Entered: 09/13/2006)

10/11/2006 161 ORDER DENYING DEFENDANTS' MOTION TO CERTIFY APPEAL: Accordingly, defendants' motion to certify an appeal of the August 15, 2006, Order is DENIED. See order on file for complete text of decision. [RE: MOTION to Certify 153, MOTION to Certify 152 Court

Reporter: [IN CHAMBERS ORDER issued by Judge Stephen G. Larson RE: MOTION to Certify 153, MOTION to Certify 152 Court Reporter: none. (jh,) (Entered: 10/12/2006)

11/06/2006 173 MINUTES OF Motion Hearing held before Judge Stephen G. Larson RE: plaintiffs MOTION IN LIMINE 1 to Preclude Evidence and testimo[n]y re: The termination of plaintiff April Florio 163 . The Court hereby DENIES plaintiffs motion. Court Reporter: Theresa Lanza. (mrgo,) (Entered: 11/09/2006)

11/07/2006 172 MINUTES OF Jury Trial – 1st Day held before Judge Stephen G. Larson Jury impaneled and sworn. Opening statements made by both sides. Witnesses called, sworn and testified. Plaintiff rest Jury Trial continued for 11/8/2006 09:30 AM before Judge Stephen G. Larson.Court [sic] Reporter: Theresa Lanza. (am,) (Entered: 11/08/2006)

11/08/2006 174 MINUTES OF Jury Trial – 2nd Day held and completed before Judge Stephen G. Larson Witnesses called, sworn and testified. Exhibits identified and admitted. Closing arguments made. Verdict reached. Jury FINDS: in favor of all defendants. Counsel for prevailing par[ti]es are directed to prepare and submit proposed

judgment on the verdict, within 5 days of today's date. Court DENIES defendants motion for judgment as a matter of law.Court Reporter: Theresa Lanza. (am,) (Entered: 11/13/2006)

11/08/2006 184 JURY VERDICT (am,) (Entered: 11/20/2006)

11/15/2006 177 RECEIPT OF REPORTERS TRANSCRIPT of proceedings for the following dates: 11/7/06 vol I, 11/7/06 vol II, 11/8/06 Court Reporter: Theresa Lanza (vc,) (Entered: 11/15/2006)

11/15/2006 178 TRANSCRIPT filed for proceedings held on 11/7/06, volume I. Court Reporter: Theresa Lanza. (vc,) (Entered: 11/15/2006)

11/15/2006 179 TRANSCRIPT filed for proceedings held on 11/7/06, volume II. Court Reporter: Theresa Lanza. (vc,) (Entered: 11/15/2006)

11/15/2006 180 TRANSCRIPT filed for proceedings held on 11/8/06. Court Reporter: Theresa Lanza. (vc,) (Entered: 11/15/2006)

11/21/2006 185 JUDGMENT by Judge Stephen G. Larson, in favor of defendants Debbie Glenn, Ontario Police Department, Arch Wireless Incorporated, Ontario City of, Lloyd Scharf and against plaintiffs Jeff Quon, Jerilyn Quon, April Florio, Doreen Klein, Steve Trujillo, that Plaintiffs shall take

nothing by way of this suit, and Defendants shall recover costs of suit pursuant to 28 USC Section 1920. (MD JS-6, Case Terminated). (am,) (Entered: 11/22/2006)

02/05/2007 207 MINUTES OF Motion Hearing held before Judge Stephen G. Larson:MINUTES RE: MOTION TO AMEND OR ALTER JUDGMENT AND MOTION FOR NEW TRIAL (filed 12-7-06). The Court heard argument on plaintiff's motion to amend or alter judgment pursuant to FRCP 59(d) and motion for new tr[ia]l pursuant to FRCP 59(a). Both motions are DENIED. With respect to the motion to amend or alter the judgment, the Court has fully reconsidered its amended order of August 15, 2006, and again confirms that it is correct. In arguing that the Court's earlier order should be set aside on the ground that the Court erred in ruling that defendant Arch Wireless acted [a]s a remote computing service, as opposed to an electronic storage service, when it disclosed plaintiff's text messages, plaintiff mistakenly confuses the issue of what was or what was not contained in the service contract between the City of Ontario and Arch Wireless with the far more pertinent legal description of what

constitutes a remote computing service, and the law related to that description, and how that law is applied to the facts of the particular storage activity provided to the City of Ontario by Arch Wireless. That is to say, the critical questions are what service (be it contracted for or not) did Arch Wireless in fact provide to the City of Ontario and whether that service is properly characterized under the law as being one of a remote computing service. For the reasons set forth in its earlier order, the Court finds that it is. With respect to the motion for new trial, the Court does not find, after reviewing all of the evidence adduced at trial, that the verdict is contrary to the clear weight of the evidence, or that the verdict is based upon evidence which is false, or that a new trial is necessary to prevent a miscarriage of justice. IT IS SO ORDERED. [RE: MOTION to Alter Judgment re Judgment, 185 . MOTION for New Trial MOTION for New Trial [sic] 191 Court Reporter: Theresa Lanza. (jh,) Modified on 2/8/2007 (jh,). (Entered: 02/07/2007)

03/15/2007	214	NOTIFICATION by Circuit Court of Appellate Docket Number 07-55282, 9th CCA regarding Appeal to Circuit Court 213 filed by Jeff Quon, Jerilyn Quon. (dmap,) (Entered: 03/15/2007)
03/26/2007	215	TRANSCRIPT DESIGNATION AND ORDERING FORM For Dates: 2/27/06, 6/26/06, 11/07/06, 11/8/06 and 10/23/06; Court Reporter: Theresa Lanza; Court of Appeals Case Number: 07-55282; Re: Appeal to Circuit Court 213 . (et) (Entered: 04/04/2007)
04/17/2007	217	TRANSCRIPT filed for proceedings held on 10/23/07. Court Reporter: Theresa A Lanza. (am,) (Entered: 04/20/2007)
04/17/2007	218	TRANSCRIPT filed for proceedings held on 6/26/06. Court Reporter: Theresa A. Lanza. (am,) (Entered: 04/20/2007)
04/17/2007	219	TRANSCRIPT filed for proceedings held on 2/27/06. Court Reporter: Theresa A Lanza. (am,) (Entered: 04/20/2007)
04/17/2007	220	TRANSCRIPT filed for proceedings held on 2/12/07. Court Reporter: The[resa] A. Lanza. (am,) (Entered: 04/20/2007)

04/17/2007	221	TRANSCRIPT filed for proceedings held on 2/5/07. Court Reporter: Ther[esa] A. Lanza. (am,) (Entered: 04/20/2007)
04/23/2007	222	CERTIFICATE OF RECORD Transmitted to USCA re Appeal to Circuit Court 213 filed by Jeff Quon, Jerilyn Quon (dmap.) (Entered: 04/23/2007)
01/23/2008	223	RECORD ON APPEAL sent to Circuit Court re: Appeal number, 07-55282 ; Record consists of 14 volumes, 4 bulky documents; 8 transcripts re Appeal to 9th Circuit Court of Appeals 213 (dmap) (Entered: 01/23/2008)

RELEVANT DOCKET ENTRIES

UNITED STATES COURT OF APPEALS, FOR THE NINTH CIRCUIT

Case No. 07-55282

Date	#	Docket Text
03/06/2007	1	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): n. Setting schedule as follows: Fee payment is due 3/20/07 ; appellant's designation of RT is due 3/9/07,, ; appellee's designation of RT is due 3/19/07,, ; appellant shall order transcript by 3/29/07,, ; court reporter shall file transcript in DC by 6/27/07; certificate of record shall be filed by 7/5/07 ; appellant's opening brief is due 8/14/07,, ; appellees' brief is due 9/14/07,, ; appellants' reply brief is due 9/28/07,, ; [07-55282] (C)
04/24/2007	8	Filed certificate of record on appeal RT filed in DC 4/17/07. (case file) [07-55282] (LN)
08/15/2007	11	Filed original and 15 copies Appellants opn br; (Informal: NO) 41 pages; 5 excerpts of record (4 Exc.vol); served on 8/14/07 (minor defcy: (Missing DC dkt)) Notified counsel. minor brief deficiency response due 8/29/07; [07-55282] (MF)
08/22/2007	13	Received Appellants satisfaction of (minor) brief deficiency. re: Rcvd district court docket [07-55282] (SW)

10/26/2007 28 Filed original and 15 copies appellee City of Ontario, Lloyd Scharf, Ontario Police Dept in 60 pages brief, 4 Exc. vols: ; served on 10/25/07 [07-55282] (SW)

11/08/2007 29 Filed original and 15 copiesof [sic] aplts reply brief, (Informal: no) 10 pages; served on 11/8/07 [07-55282] (SW)

02/06/2008 36 ARGUED AND SUBMITTED TO Harry PREGERSON, Kim M. WARDLAW, Ronald B. Leighton [07-55282] (LN)

06/18/2008 39 FILED OPINION (HARRY PREGERSON, KIM MCLANE WARDLAW and RONALD B. LEIGHTON) AFFIRMED IN PART; REVERSED IN PART; REMANDED. The parties shall bear their own costs of appeal. [Affirmed in Part and Reversed/Vacated in Part;Terminated on the merits after oral hearing; Written, reasoned, signed, published; Judge: HP On Panel But Did Not Write, Judge: KMW Authoring, Judge: RBL On Panel But Did Not Write]. FILED AND ENTERED JUDGMENT. (RP)

07/01/2008 44 Filed order (HARRY PREGERSON, KIM MCLANE WARDLAW and RONALD B. LEIGHTON) Granting Appellee Motion to extend time to file petition for rehearing filed by Appellees Ontario Police Dept, Lloyd Scharf and City of Ontario. Petition for rehearing due 07/16/2008 Appellee. (KKW)

07/16/2008 49 Filed original and 50 copies of Appellees City of Ontario, Ontario Police Dept and Lloyd Scharf's petition for panel rehearing and petition for rehearing en banc. Number of Pages: 20. Served on 07/15/2008. Date circulated to the court: 07/17/2008 (PANEL – ACTIVE JUDGES – ANY INTERESTED SENIOR JUDGES) (LC)

07/28/2008 54 Filed original and 50 copies of Amicus Curiae USA's amicus brief in support City of Ontario, Ontario Police Department, and Lloyd Scharf's petition for rehearing en banc, 21 pages; served on 07/25/2008. (PANEL – ALL ACTIVE JUDGES – ANY INTERESTED SENIOR JUDGES) (LC)

07/28/2008 55 Filed – CSAC Excess Insurance Authority's motion to file amicus brief in support of City of Ontario and Ontario Police Dept.'s petition for rehearing en banc;. Served on 07/25/2008. (PANEL) (LC)

07/28/2008 56 Received original and 50 copies of CSAC Excess Insurance Authority's amicus brief in support of City of [O]ntario and Ontario Police Depart.'s petition for rehearing en banc, 7 pages; served on 7/25/08 (Deficiency: Motion pending.) (PANEL – ALL ACTIVE JUDGES – ANY INTERESTED SENIOR JUDGES) (LC)

07/31/2008 57 Filed order (HARRY PREGERSON, KIM MCLANE WARDLAW and

RONALD B. LEIGHTON): Plaintiffs-Appellants are hereby directed to file a response to Defendants- Appellees' Petitions for Rehearing and Rehearing En Banc. The brief shall not exceed 15 pages and shall be filed within forty-two days of the filing of this order. IT IS SO ORDERED. (AF)

09/11/2008 59 Filed an original and 50 copies of Appellant's response to appellee's petition for rehearing en banc, per 7/31/08 order; 16 pages, served on 09/10/2008. (fed- ex PANEL – ALL ACTIVE JUDGES – ANY INTERESTED SENIOR JUDGES) (LC)

01/27/2009 60 Filed Order for PUBLICATION (HARRY PREGERSON, KIM MCLANE WARDLAW and RONALD B. LEIGHTON) Judge Wardlaw concurring. Judge Ikuta Dissenting. Judges Pregerson, Wardlaw, and Leighton voted to deny Appellees' petition for panel rehearing. Judges Pregerson and Wardlaw also voted to deny Appellees' petition for rehearing en banc, and Judge Leighton so recommended. The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc reconsideration. Fed. R. App. P. 35. Judge Bybee was recused. The

petition for rehearing en banc is denied. (RP)

01/29/2009 61 Filed (ECF) Appellees City of Ontario and Ontario Police Dept Motion to stay the mandate. Date of service: 01/29/2009. [6789872] (KJB)

02/02/2009 66 Filed order (HARRY PREGERSON, KIM MCLANE WARDLAW and RONALD B. LEIGHTON) Appellees' motion to stay the mandate pending the filing of a petition for writ of certiorari in the Supreme Court is granted. Fed. R. App. P. 41(d)(2). It is so ordered. (KKW)

04/30/2009 70 Filed (ECF) Appellees City of Ontario, Ontario Police Dept and Lloyd Scharf Correspondence: Notice Under FRAP 41(d)(2)(B) of Filing of Petition for Writ of Certiorari. Date of service: 04/30/2009 [6903322] (KJB)

05/05/2009 71 Received notice from the Supreme Court: petition for certiorari filed on 04/27/2009. Supreme Court Number 8-1332. (LC)

[SEAL] **CITY OF ONTARIO**
MEMORANDUM

TO: All Supervisory Personnel

FROM: Lloyd Scharf, Chief of Police

DATE: April 29, 2002

SUBJECT: SUPERVISORY STAFF MEETING MINUTES – APRIL 18, 2002

Chief, Captain Doyle, Captain Fryer, Lt. Burger, Lt. Del Rio, Lt. Duke, Lt, Hadley, Lt. Hill, Lt. Hopley, Sgt. Bernhard, Sgt. Britt, Sgt. Cover, Sgt. Cummings, Sgt. Endo, Sgt. Evans, Sgt. Ferguson, Sgt. Graff, Sgt. Hadley, Sgt. Hickman, Sgt. Irvin, Sgt. Johnson, Sgt. Mendez, Sgt. McMahon, Sgt. M. Ortiz, Sgt. Pittman, Sgt. Quon, Sgt. Schneider, Sgt. Spinnato, Sgt. Thomas, Sgt. Vandever, Sgt. Wirtz, Naomi Roberts, Ann Punter, Shae Guderian, Shelley Schoue, Danita Chulla

Excused Absences: Capt. Roberts, Lt. Stipes, Sgt. Glenn, Sgt. J. Harris, Sgt. Brown.

CHIEF

City has hired a fulltime Risk Manager, Anna Garcia, from the City of Santa Ana. Human Resources Director Johnson and she will be joining our staff meeting shortly.

Human Resources Director Gordon Johnson introduced Ms. Garcia and briefly went over her experience as a Risk Manager. Reminded staff that JT2 works for the City and they do not have the last word in a workers' compensation claim. Risk Manager Garcia emphasized her experience in handling ergonomic and carpal tunnel syndrome issues.

DET. COURTNEY

To date, we have 15 lawsuits filed against the City, most of them stemming from serviced search warrants. Major suits are due to shooting on Flora Street; another one is related to money seized at OIA. We recently received a suit on an arrest concerning an emergency protective order.

The annual awards banquet is May 9, 11:30 AM at the Doubletree Hotel. We are presenting four citizen awards and 34 police personnel awards. We would like to provide complimentary tickets to family members of those receiving awards. We will present medals of valor and bravery.

Flag ribbons have been distributed and should be worn until September 11, 2003. Extra ribbons are available in the W.C.'s office.

I have prepared a civil litigation handbook that answers frequently asked questions when an officer/ city employee is served with a civil lawsuit. What

prompted me to create such a handbook is that we have not provided training on this for over 10 years. We plan to do training on this very soon.

LT. DUKE

Through an NIJ grant, we will receive approximately $1.8 million to start the IBIS program for all of our B/W units; upgrade of computer systems, and wire neighboring participating agencies. Responses should take about 45 seconds to a minute. Grant should be awarded by the end of this year. Also, revising our General Order on IBIS system and advisory statement that is to be provided to individuals in the field. Advisory statement must be included in report. A training bulletin is to go out soon.

Installation of AVL systems is about 80% complete. We also have received approval to order 22 new B/W units. We should receive them sometime in the summer. We have been experiencing problems with MDCs going down during evening hours. A software patch has been installed to correct problem. Seems that most of the problems were due to the Windows 2000 program. A problem log has been developed to track and address MDC problems.

Reminder that two-way pagers are considered e-mail messages. This means that messages would fall under the City's policy as public information and eligible for auditing.

As Chief stated, we just issued a purchase requisition totaling $64,000 for computers, monitors, printers, etc.

CHIEF

According to Detective Miller, Forcible rapes are down 51%, Robberies up 38%; Aggravated Assault down 12%, Burglaries down 45%, and GTAs up 13%.

Recently we had a complaint from Resident B. Little, alleging police units speeding on Holt from Vineyard and Sultana. Through the AVL System we were able to trace the units' route and determine their speed to be within speed limits, thus disproving his complaint.

Those that have not attended the Doug Bos Debriefing might consider attending the next one. We started this program to explain circumstances surrounding this case and provide the information (red flags) we missed. We have received a lot of positive feedback on this presentation. We will be providing this debriefing to the Reserve Unit.

SGT. COVER

There have been two issues we have attempted to resolve since the Super Bowl shooting. First one is high-capacity guns, such as the H&K. Instead of issuing new guns to all officers, new officers will be offered a choice at the Range. We have been able to work out a solution involving MAG pouches and Holsters. These will be purchased from SafariLand.

We will supply new lighter leather gear, which is about 1-½ lbs. lighter than old gear. We should have these by two months from SafariLand and Uncle Mikes.

We have purchased about 25-30 training videos. Supervisors will have to sign when checking out videos. Two new TVs have been set up in the Briefing Room.

CAPT. DOYLE

With regard to the Alarm program, Technician Carol Nelson has updated our billing of alarm cards and alarm permit file. To date, she has collected about $15,000 from individuals without alarm permits. As some may recall Corporal Carroll drafted a new alarm card that will be posted at premises. It is important that alarm cards are left at the premises. Our next step is to set a priority code for alarms, increase the fee, and for Technician Carol to start visiting businesses and signing them up for alarm program.

[SEAL] **CITY OF ONTARIO**
MEMORANDUM

TO: **Lloyd Scharf, Chief of Police**

FROM: **Patrick McMahon, Sergeant**

DATE: **July 2, 2003**

SUBJECT: **INTERNAL AFFAIRS INVESTIGATION OF JEFFREY QUON (I-02-03)**

On October 30, 2002, I received this internal affairs complaint regarding Sergeant Jeffrey Quon from Deputy Chief Doyle. The investigation concerned the on-duty use of a Department issued two-way text pager. During the month of August 2002, Sergeant Quail exceeded the maximum number of characters allotted to his City issued two-way text pager. At the request of the Chief of Police, Lieutenant Steven Duke conducted an audit to see if this overage was due to work related or personal text transmissions and how many of the transmissions occurred during regularly scheduled work hours. Lieutenant Duke had Administrative Assistant Nancy Keller contact Arch Wireless, via e-mail; and request an audit of all transmissions sent and received from pager 909 399-2191. Support Specialist Jackie Deavers from Arch Wireless hand carried the audit to Ontario Police Department and gave it to Ms. Keller.

I began my investigation by reviewing memorandums from Deputy Chief Jim Doyle, Captain Tony Del Rio,

and Sergeant Jeffery Quon along with the text transmission audit for pager number 909 399-2191. This City owned two-way text pager was issued to Sergeant Quon as part of his equipment as a member of the S.W.A.T. team.

After Lieutenant Duke received the audit from Arch Wireless, it was given to Captain Del Rio to begin an investigation regarding the possible misuse of a city owned text pager. The Audit showed Sergeant Quon had exceeded his monthly allotted characters by 15,158 characters. Captain Del Rio sent Sergeant Quon a memorandum requesting he state, in writing, his understanding of the intended use of the pager, reason for the overage, how much on-duty time was used to send and receive messages, and why his text transmissions contained sexually explicit material. Sergeant Quon was ordered to submit his memorandum to Deputy Chief Doyle by 5:00 P.M. on October 17, 2002.

On October 16, 2002, Deputy Chief Doyle amended Captain Del Rio's memorandum and excluded the question regarding the sexually explicit transmissions. Sergeant Quon was also given until October 25, 2002, to submit his memorandum.

On October 25, 2002, Sergeant Quon submitted his memorandum to Deputy Chief Doyle. In Sergeant Quon's memorandum, he explained the reason for his overage was due to "transmitting and receiving more

characters than the monthly allotment." Sergeant Quon stated he did not know what the monthly allotment of characters was and his pager does not alert him when the maximum allotment has been reached. In fact, Sergeant Quon was unaware of the overage until it was brought to his attention by Captain Del Rio's memorandum.

Regarding the intended use of the pager, Sergeant Quon stated S.W.A.T. team members were issued pagers based on an agreement with the police department because of a "refusal to pay overtime or stand-by pay to officers who must be available for" S.W.A.T. call-outs. Sergeant Quon said, "In exchange, the S.W.A.T. officers agreed to not put in for stand-by pay or other overtime compensable under FLSA and city rules." Sergeant Quon added there "was *never* a discussion concerning restrictions on the use of the pagers." He said at no time was he told the pager could not be used for personal messages or that text transmissions would be retrieved from electronic storage. Sergeant Quon added it had been the "City's unwritten practice" to notify officers of overage and require them to write a check for the difference. Sergeant Quon concluded the "use of the pager was for both, city and personal communications with any overages to be brought to the officer's attention for repayment."

Sergeant Quon said he could not answer how much time he spent on the pager during work hours

because he was not provided with a "work schedule for August 2002 or a detail of actual hours worked." Sergeant Quon also stated in his Memorandum that he believed the Department had violated his "rights to privacy and electronic communications" by ordering transcripts of the text messages.

It should be noted in the paperwork I received to begin my investigation were copies of two faxes regarding this case. One fax was from Attorney Steve Filarsky, City of Ontario personnel attorney. In Mr. Filarsky's fax on October 22, 2002, he had outlined the city's right to audit and posses the pager transmissions. The second fax was from Attorney Michael Lackie, Sergeant Quon's attorney. In Mr. Lackie's fax on October 24, 2002, he replied to Mr. Filarsky's letter stating the City did not have a right to posses a copy of the text messages that were obtained from Arch Wireless. I spoke to Mr. Filarsky who told me the City has the right to audit and possess the stored transmissions from their City text pagers.

As I began to review the text audit, it appeared the majority of transmissions were personal. To see how many of these messages occurred on-duty, I requested Sergeant Quon's time sheet for August 2002. Using his time sheet, I matched the date and time Sergeant Quon received and transmitted a text message during his normally scheduled workday. I crossed out the messages that did not occur on-duty then totaled the transmissions he had received and sent for each workday. Sergeant Quon had a total of 456

transmissions during his normally scheduled work-day for the month of August. He averaged 28 transmissions each day he worked, the most was 80 on August 14 and the least was 6 on August 29.

On December 10, 2002, Captain Del Rio contacted me and said he remembered a supervisory staff meeting that Lieutenant Duke said the City issued text pagers could be audited. Using the information Captain Del Rio provided me, I spoke to Senior Administrative Assistant Lorena Villa who keeps track of all staff meeting minutes. On page 3 of the supervisory staff meeting minutes for April 18, 2002, Lieutenant Duke reminded all supervisors that the "two-way pagers are considered e-mail messages." Lieutenant Duke added this would mean the "messages would fall under the City's policy as public information" and is "eligible for auditing." Based on the memorandum for the staff meeting minutes, Sergeant Quon was present.

On December 18, 2002, Sergeant Deborah Glenn and I conducted an interview of Sergeant Quon along with his attorney, Michael Lackie. The interview was conducted in the Internal Affairs office at 09:57a.m. Before the interview began, I gave Sergeant Quon a copy of the Internal Affairs Admonishment to Sworn Personnel. When I began the interview, I read a portion of the admonishment and the section covering Miranda. Sergeant Quon stated he understood his Miranda rights but refused to wa[i]ve them. Once I ordered Sergeant Quon to answer all question under threat of insubordination, we began the interview.

The following is a synopsis of Sergeant Quon's interview: When Sergeant Quon was issued a City-owned two-way pager, he said he did not receive any information regarding using it for personal business. Sergeant Quon believed it was ok to use it for personal transmissions because Lieutenant Duke had told him if he didn't want the department to read his text messages, he would have to pay the overage fees. The first month Sergeant Quon was issued the text pager he said he went over the maximum amount of characters allotted. Sergeant Quon said the first month he had the city issued text pager, he had to write a check to the City to cover the amount of characters he went over.

I asked Sergeant Quon if he ever recalled a discussion with Lieutenant Duke that if his text-pager went over, his messages would be audited. Sergeant Quon said, "No. In fact he [Lieutenant Duke] said the other, if you don't want us to read it, pay the overage fee."

I showed Sergeant Quon a copy of the City's Computer Usage, Internet and E-mail Policy along with a copy of his acknowledgement dated March 18, 2000. Sergeant Quon said he recognized the City policy and identified his signature on the acknowledgement copy. In the city policy under II POLICY, it states, "The use of City-owned computers and all associated equipment, software, programs, networks, Internet, e-mail and other systems operating on these computers is limited to City of Ontario related business." Sergeant Quon said he believed this meant the "equipment that we utilize here at the

department." He said this included "City-owned computer stuff that's here in the cars, all that stuff."

Using the redacted copy of the text transmission audit, I had Sergeant Quon make a mark next to all transmissions that were work related. While he was doing that I asked Sergeant Quon if he ever told anybody not to send him pages while he was at work. Sergeant Quon said, "No." Sergeant Quon believed it took about 15 seconds to either receive or send a text message. He also did not believe the amount personal text messages were excessive. Of the 456 transmissions that occurred on duty, Sergeant Quon indicated 57 of them were work related.

I handed Sergeant Quon a copy of April 18 supervisory staff meeting minutes and asked if he recognized the document. Sergeant Quon stated it was minutes to a supervisory staff meeting that are passed out and thrown "in our box." I asked Sergeant Quon if he recalled attending this meeting, he said he was not sure. I pointed to his name on page 1, indicating he had attended the meeting and had him review the minutes. Sergeant Quon only vaguely recalled attending and did not recall Lieutenant Duke state, "Reminder that two-way pagers are considered e-mail messages. This means that messages would fall under the City's policy of public information and eligible for auditing."

This concluded the interview with Sergeant Quon.

After this interview, I spoke to Lieutenant Duke about his conversation with Sergeant Quon regarding

the City issued text pagers. Lieutenant Duke said part of his job assignment is to monitor and review the City's pager bill. Within the first or second billing cycle after Sergeant Quon had received his City issued two-way text pager, Lieutenant Duke remembered Sergeant Quon had exceeded his maximum number of allotted characters. Because of the overage, Lieutenant Duke went to Sergeant Quon and told him the City issued two-way pagers were considered e-mail and could be audited. He told Sergeant Quon it was not his intent to audit employee's text messages to see if the overage is due to work related transmissions. He advised Sergeant Quon he could reimburse the City for the overage so he would not have to audit the transmission and see how many messages were non-work related. Lieutenant Duke told Sergeant Quon he is doing this because if anybody wished to challenge their overage, he could audit the text transmissions to verify how many were non-work related. Lieutenant Duke added the text messages were considered public records and could be audited at any time.

On December 20, 2002, the City Clerk received a Claim for Damages from attorney Michael Lackie on behalf of Sergeant Quon, Sergeant Steve Trujillo, Corporal James Renstrom, Jerilyn Quon, April Florio, and Doreen Klein. The claim was for auditing Sergeant Quon's city issued text pager and reviewing his text messages violating his right to privacy. An amended Claim was submitted on January 3, 2003 to the City of Ontario for the same violations. The City

rejected the first claim on January 15 and the second claim on January 24. Mr. Lackie filed a lawsuit in Federal court after his Claims were rejected. City received a copy of the lawsuit on March 11, 2003.

On February 13, 2003, I spoke to Captain Del Rio regarding Sergeant Quon's use of his City issued text pager. I asked Captain Del Rio if there ever was an issue with Sergeant Quon spending too much time answering and replying to text messages on his City issued text pager. Captain Del Rio stated he couldn't "think of a situation were the pager was going off either in the station" or out in the field "that interfered" with his job. In fact, Captain Del Rio said when he saw Sergeant Quon "dealing with his pager, it did not seem excessive." Sergeant Quon treated his pager "just like everyone else."

Captain Del Rio said he worked with Sergeant Quon two to three days a week and never had a problem with him disappearing. Captain Del Rio added Sergeant Quon handled all his calls and did a very good job keeping him informed as to things occurring on the shift. If Captain Del Rio needed Sergeant Quon at a location, he said Sergeant Quon was there.

On February 13, 2003, I also spoke with Deputy Chief Doyle regarding this investigation. I advised Deputy Chief Doyle in regards to the pending lawsuit and asked if he wanted me to continue with this investigation. Deputy Chief Doyle and I decided to suspend this case pending a review by a Federal Judge.

On July 2, 2003, Deputy Chief Doyle asked me to conclude this investigation after speaking with attorney Steven Filarsky. I reviewed all the information I had and believed it was sufficient to conclude my investigation.

Based on all of the information in this investigation, I made the following findings: Although Sergeant Quon said he was not given specific instructions on the personal use of his City issued text pager, he was told on several occasions his messages could be audited. Lieutenant Duke said he explained to Sergeant Quon the first time he went over the maximum amount of characters that his messages were e-mail and subject to audit. Lieutenant Duke added if Sergeant Quon didn't want the department reading his messages, he needed to reimburse the City for the amount of the overage. On April 18, 2002, Lieutenant Duke made an announcement during the Supervisor Staff Meeting, attended by Sergeant Quon, that the two-way pagers were considered e-mail and fell under the City's policy as public information and were eligible for auditing.

When I spoke to attorney Steve Filarsky, it was his opinion that under the City's Computer Usage, Internet and E-mail Policy the term "all associated equipment" (II POLICY) covered the two-way text pagers. Further, the City's policy did make an exception for "light personal communications." This type of communication is determined by the "Agency Head or Department Director" and is subject to "access and disclosure."

Based on my investigation, I find Sergeant Quon sent and received an excessive amount personal text messages on his City issued two-way text pager. On one day alone, Sergeant Quon had sent and received a total of 80 non-work related transmissions. On average, Sergeant Quon would send and receive 28 transmissions during his normally scheduled shift. Of the 28 transmissions, 3 would be business related and the rest would be non-work related. In conclusion, Sergeant Quon did not use proper care with Departmental equipment. I find this allegation **SUSTAINED** and Sergeant Quon to have violated the following Ontario Police Department Rules and Regulation:

CITY OF ONTARIO POLICE DEPARTMENT RULES AND REGULATIONS MANUAL

201 INDIVIDUAL RESPONSIBILITIES OF OFFICERS AND MEMBERS –

h. Adherence to rules, regulations, orders and Departmental procedures.

l. The proper care and use of Departmental equipment, supplies and facilities.

CITY OF ONTAIRO ADMINISTRATIVE MANUAL COMPUTER USAGE, INTERNET AND E-MAIL POLICY I-7-4

III GEN[E]RAL PROVISIONS

A. The use of any City-owned computer equipment, computer peripherals, City networks, the Internet, e-mail services or

other City computer related services for personal benefit or entertainment is prohibited, with the exception of "light personal communications" as noted in Provision F of this policy.

[/s/ L Scharf
7-17-03]

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JEFF QUON, JERILYN QUON, APRIL FLORIO, DOREEN KLEIN, STEVE TRUJILLO, et al., Plaintiffs, vs. ARCH WIRELESS, INC., CITY OF ONTARIO, et al., Defendants.	)	No. EDCV 03-0190 RT (SGLx)

DEPOSITION OF JEFFREY QUON

Santa Ana, California

June 10, 2004

Reported by:

JOANNE K. JACOBS
CSR NO. 1082

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[7] be able to give me your best testimony here today?

A Nothing.

Q What is your date of birth?

A [Date Of Birth Omitted].

Q And your Social Security number?

A [Social Security Number Omitted].

Q I am not going to ask you your home address.

MR. MORGUESS: Thank you.

Q BY MS. STEPHAN: You are presently employed with the City of Ontario; correct?

A Yes.

Q How long have you been with the City of Ontario?

A Since 1981.

Q And prior to the City of Ontario, did you work for any other police agency?

A No.

Q First job as a police officer was with the City of Ontario?

A Correct.

Q And what is your present position with the City?

A Sergeant, assigned to patrol, and SWAT team.

Q What is your position with SWAT?

A I am a team leader, team sergeant, responsible for training and planning of the execution

of high-risk warrants, also rescue, all the tactical stuff.

* * *

[15] traffic, including basic, intermediate and advanced reconstruction, would that be "special circumstances," which would benefit the department, in your opinion?

MR. MORGUESS: Objection, calls for speculation.

Q BY MS. STEPHAN: You can answer.

A I believe any training that someone could provide is definitely good for the department.

Q Are you presently married?

A. Divorced.

Q When were you divorced?

A I can't remember the date it was official.

Q How about the month and year?

A I want to say 2002, maybe, guessing.

Q Rough estimate?

A Rough estimate.

Q I'm going to keep saying that to you, apparently, huh?

And how many times have you been married?

A Twice.

Q Your first marriage was to who?

A Lorraine Zabala.

Q Second marriage to who?

A Jerilyn Ponce.

Q When did you and Jerilyn get married?

A We were married for eleven years. I believe it

* * *

[21] Q And let me steal this back from you.

Were you aware that the City considered all the e-mails not to be confidential?

A I understood that e-mails on the City owned computers and MDC's in the units were not confidential. That is what I signed the e-mail waiver for.

Q You were aware that e-mails were not confidential pursuant to the City policy?

A On the City computers. Like in the sergeants office, we have a hard drive computer, you can go on the Internet, that is what I am talking about.

MR. DISENHOUSE: MDT's.

THE WITNESS: MDC's, MDT's.

MR. DISENHOUSE: Mobile data terminal.

THE WITNESS: Those messages on that, that is what.

Q BY MS. STEPHAN: That is what your understanding of this meant?

A Yes, only to those.

Q You were aware that it was inappropriate to use derogatory, obscene, suggestive, defamatory or harassing language on the e-mail system?

A Yes.

Q And the e-mail system was permitted for only light personal communications?

* * *

[26] Q And what do you do with them when you have them, when you get the memorandum?

A Throw them in the trash.

Q In recycling?

A No, they go right in the trash can in the sergeants office with everybody else's.

Q When did you first learn that the City had audited your text message pager?

A When I got called into the office by Lieutenant Tony Del Rio.

Q What did Lieutenant Del Rio tell you?

A He handed me a packet of paper about this thick, two inches thick, with a memorandum attached to it, saying that – I'm trying to remember what the memo said – that I went over on my allotted

characters that were given to me by the City, which caused an audit of my text message account. And then they asked me to respond to four questions in regards to the transcripts of my text messages.

Q Had you ever gone over the allotted characters on your City-owned text pagers?

A Yes.

Q About how many times?

A Probably three or four times.

Q And on those three or four occasions, how did you [27] learn you had gone over your allotted number of characters?

A Steve Duke would come in and tell me. Lieutenant Duke would come and tell me that I owed X amount of dollars because I went over my allotted characters.

Q The number of characters that you are permitted, is that dictated by the City of Ontario?

A My understanding is they pay one flat rate and we get X amount of characters. If we exceed it, we have to pay the difference.

Q And Lieutenant Duke told you that you had gone over on a couple of occasions?

A Yes, three or four times.

Q And would he have you write a check to the City for the overage?

A Yes. I wrote the check to Linda Teeter, made out to the City of Ontario.

Q Do you get duplicates of your checks?

A I bank with the credit union. I don't get duplicate checks, no.

Q When did Lieutenant Duke first inform you that you had gone over on your allotted number of characters on your City-owned pager?

A The very first time?

Q Very first time, rough estimate.

* * *

[33] time.

Q Were April and Steve some of your better friends of the department in, say, 2002?

A I don't remember, you know, that year who I was hanging out with. We rotate shifts, so you hang out with people you work with, maybe is a better way to answer it.

Q When Lieutenant Del Rio sent you the memo indicating that you had to answer four questions, what were the questions, if you recall off the top of your head?

A I believe one was what was my understanding in the use of the pager, why did I go over my allotted characters, how much on duty time was used

on the pager, and explicit language or something to that effect on the text messenger.

Q What was your understanding of the use of the text message pager in August 2002?

A We are all assigned to the SWAT team, and we are on call 24/seven, and we were given the pager and allowed to use it in any fashion we wanted to, just had to pay the overage fee.

The only thing we asked of the guys on the team, if we paged you for a SWAT thing, please respond so we can tally the numbers up, so if we get a call-out or search warrant package we have got to do, Steve and I can know [34] who is coming and who is not coming so we can plan. And pay your overage fees when you were told to pay your overage fees.

Q Who told you that information on that use?

A Steve Duke, Steve Trujillo, Lieutenant Burger.

Q Anybody else off the top of your head?

A That is about it that I can think of.

Q Did you actually review the messages that Lieutenant Duke attached?

A Yes.

Q And what percent of those messages were sent on duty, if you know?

A Very few.

Q In August of 2002, were you dating April Florio?

A Yes.

Q Were you separated from Jerilyn at that point?

A Yes.

Q Do you know if you were actually divorced at that point?

A No.

Q That was a bad question on my part.

Were you actually divorced at that point?

A I don't believe so. I think we were still seeing each other and dating and I was dating April, too.

Q Were you dating any other women at the City of

* * *

[37] Q What do you mean by private conversation between two people?

I need to know kind of the substance of what they would be. I mean, everyone has an idea of intimate and private. I need to know what you mean by those phrases.

A My idea is I don't think anybody has a right to read what I am telling somebody else when I don't know it is being read. So anything I said to anybody

on that is considered private to me, unless I send it to the City.

Q So any kind of conversation, in your mind, would be considered private and intimate?

A Yeah.

Q Have you ever sent private information over the MDT or MDC?

A No.

Q Did you ever receive any private or intimate information over the MDT or MDC from Jerilyn Quon?

A She was an employee then of the City of Ontario. There might have been something of a personal nature. I don't recall, though.

Q You don't have a problem with those being disclosed; correct?

A Well, that is why I signed the waiver for using MDC. With the e-mail policy, you have to watch what you put on those systems because those are monitored.

* * *

[Reporter's Certificate Omitted In Printing]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JEFF QUON, JERILYN QUON, APRIL FLORIO, DOREEN KLEIN, STEVE TRUJILLO, et al., Plaintiffs, vs. ARCH WIRELESS, INC., CITY OF ONTARIO, et al., Defendants.	No. EDCV 03-0190 RT (SGLx)

DEPOSITION OF JEFFREY QUON

Santa Ana, California

June 10, 2004

Reported by:
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* * *

[55] A No.

Q What else, if anything, did you discuss with Captain Doyle other than what you have already told me?

A I told them I was very upset, I felt that my rights had been violated, and that somebody had committed a felony, and that that needed to be handled, and Jerilyn, my wife, and I were trying to get back together and, you know, the fact that they shared that packet with the other people embarrassed me, made me very, very upset and angry with the department.

Q Who shared the package?

A I don't know. The Chief read it, Debbie read it, McMahon read it, Duke read it, Tony Del Rio read it. I don't know, probably six or seven people read it.

Q Anyone other than Internal Affairs and your direct supervisor and the Chief?

A Yeah, there is possibly the people that work back there. Courtney at the time was working in an administrative position.

Q You indicated possibly. Do you know if anybody else reviewed it?

A Those people that I mentioned are the ones I knew had to have read it because they all discussed it with me

Q Any rumor mill going around about anybody who read it?

[56] A There was rumors about, people spreading all kinds of things, comments and things like that.

Q Do you recall anybody who was spreading those rumors?

A No. You know how it goes.

Q Did you inform Captain Doyle that Steve Trujillo had overheard a conversation between Sergeant Glenn, Lieutenant Duke and the Chief?

A I think I told the Chief about it.

Q Did you tell Captain Doyle?

A I don't remember if I told him that or not.

Q When you told the Chief that Steve Trujillo had told you about that conversation, what did he respond?

A I think I caught him off guard, to be honest. He was upset with me, and the fact that I was challenging him on this.

Q What did he say?

A He showed me the e-mail waiver, said something like you are going to sue me? And I said, yeah, if you don't make this right, I am going to sue you.

And then he went into a dissertation about dating subordinates, and I kind of I told him, you know, get real, everybody dates everybody at police departments.

And we had a conversation about the case law stuff and I showed him, and he said if we did something

* * *

[58] A No.

Q Did you speak with anyone other than union reps and your attorneys regarding the Internal Affairs investigation, the first interview?

A I don't remember. Some of the sergeants, we would sit and talk about stuff, and this was like a big topic. So people were asking questions about it and I would tell them what happened.

Q Do you recall who was asking you questions?

A No, everybody.

Q Anyone in particular that you remember?

A No. Probably the guys I was working with the closest.

Q Do you recall who it was at that time?

A Maybe Mike Macias, Ernie Dorme, Tony Del Rio, we discussed it. I can't think of anyone else.

Q When did you become a sergeant?

A I want to say in '94 or '95.

Q Prior to becoming a sergeant, what was your position?

A I was a detective assigned to robbery, and I did various assignments in that nine years I was a detective.

Q And since becoming a sergeant with the City of Ontario, have you always been assigned to patrol?

A Yes, and SWAT.

* * *

[Reporter's Certificate Omitted In Printing]

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JEFF QUON, JERILYN QUON, APRIL FLORIO, DOREEN KLEIN, STEVE TRUJILLO, et al.

Plaintiffs

vs.

ARCH WIRELESS, INC., CITY OF ONTARIO, LLOYD SCHARF, DEBBIE GLENN, et al.,

Defendants.

Case No. EDCV 03-0199 RT (SGLx)

AFFIDAVIT OF LT. STEVE DUKE

I, Steve Duke, declare as follows:

1. I am a Lieutenant with the City of Ontario Police Department. I was the Administration Bureau Commander. If called as a witness, I could and would

competently testify to the facts contained within this affidavit.

2. At a Supervisory Staff meeting on April 18, 2002, I informed all supervisory staff at that meeting, including plaintiff Jeff Quon that the city owned and issued alphanumeric pagers were considered e-mail, and that those messages would fall under the City's policy as public information and eligible for auditing.

3. The staff who were issued alphanumeric pagers were given a character limit on those pagers. In other words, before the City would incur additional costs, they could utilize 25,000 characters for messages.

4. In August, 2002, when two officers went over the limitation on characters, the Chief had me request the transcripts of those pagers for auditing purposes. He asked me to determine if the messages were exclusively work related, thereby requiring an increase in the number of characters officers were permitted, which had occurred in the past, or if they were using the pagers for personal matters. One of the officers whose transcripts I requested was plaintiff Jeff Quon.

5. The only transcripts of text messages provided by Arch Wireless to the City of Ontario, which are at issue in this litigation, were those of JEFF QUON to and from his city owned and issued alphanumeric pager. To my knowledge, the other officer whose transcripts were audited has not filed any grievance with or against the City of Ontario.

6. At no time have I, or anyone to my knowledge at the City of Ontario, requested the transcripts of the text message pagers of plaintiffs Steve Trujillo, Doreen Klein, April Florio or Jerilyn Quon. Again, the only transcripts of text messages provided by Arch Wireless to the City of Ontario, which are at issue in this litigation, were those sent to and/or from the City of Ontario's pager issued to Jeff Quon.

I declare under penalty of perjury, pursuant to the laws of the state of California, that the foregoing is true and correct.

This declaration is signed this ___ day of October, 2004 in ___, California.

_____

STEVE DUKE, Declarant

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JEFF QUON, JERILYN QUON, APRIL FLORIO, DOREEN KLEIN, STEVE TRUJILLO, and ROES 1 through 20, inclusive, Plaintiffs, vs. ARCH WIRELESS OPERATING COMPANY, INCORPORATED, a Delaware Corporation; CITY OF ONTARIO, a Municipal Corporation; ONTARIO POLICE DEPARTMENT; LLOYD SCHARF, individually and as Chief of Ontario Police Department; DEBBIE GLENN, individually and as a Sergeant of Ontario Police Department; and DOES 1 through 20, Inclusive, Defendants.	Case No. EDCV 03-0190 RT(SGLx)

VIDEOTAPED DEPOSITION OF STEVEN DUKE

Date: Wednesday, November 10, 2004

Times: 1:27 p.m. to 3:19 p.m.

Location: 367 North Second Avenue
Upland, CA 91786

Reported by: Carla J. Ambriz
CSR No. 12504
Job No. 28308

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San Bernardino, California 92401
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– FAX (909) 884-0555

* * *

[8] Q. Is there any medical condition or medicine that you've taken or not taken that would prevent you from completing the deposition today?

A. No.

Q. If you need to take a break, let me know. We'll be happy to do so. It is a little stuffy in here, and I know that sometimes I end up going on for hours at a time. I don't do that on purpose. We want to take breaks. So let's get started.

Where are you currently employed?

A. City of Ontario Police Department.

Q. And what position do you occupy?

A. I'm a lieutenant.

Q. And how long have you been a lieutenant?

A. About two years, ten months.

Q. Where were you assigned in 2002?

A. I was assigned as a lieutenant in the administration bureau.

Q. What kind of duties did you have as an administrative lieutenant?

A. The administration bureau was the fiscal responsibility of the agency, grants, purchasing and receiving, budget, and the new police building was more our major responsibilities.

Q. Were you in charge of internal affairs?

[9] A. No.

Q. Are you familiar with the chain of command within internal affairs?

A. Yes.

Q. Have you ever worked internal affairs?

A. Yes.

Q. When did you last work internal affairs?

A. I worked it until December of 2001.

Q. In the time that you were – well, withdrawn.

The sergeants that are in internal affairs, what is their chain of command?

A. They answer to the chief of police.

Q. And so they don't have to answer to anybody in between?

A. Well, they have to answer to everybody that's superior to them, such as captains and lieutenants. However, their direct chain of command is the chief.

Q. So anything that they may be investigating, the discussion would be between them and the chief as far as what to do next, that kind of thing?

A. Usually.

Q. All right. Now, in 2002, did you have any involvement in the issuance of pagers to department employees?

A. Some.

[10] Q. Okay. Can you describe what involvement you had.

A. Well, I was in charge of the purchasing contract, as far as my bureau was, and then any ordering of pagers were done through the people that work for me.

Q. All right. Did you have any involvement in issuing the pagers?

A. Personally issuing, no.

Q. Who issued the pagers on a personal basis?

A. Usually Nancy Keller.

Q. Nancy Keller is who in the department?

A. She is an administrative assistant in the fiscal services unit.

Q. Is she a civilian employee?

A. Yes, she is.

Q. Does she work for you?

A. Now?

Q. I'm sorry. In 2002.

A. Yes, she did.

Q. Okay. Now, did you provide her with any instructions or directives on how to issue pagers?

A. No.

Q. Do you know how she knew how to issue pagers? That is, the process that she used in 2002 to hand pagers out?

[11] A. Yes. She was doing it prior to me taking over that bureau.

Q. Did you learn from her how those pagers were going to be issued?

A. Yes.

Q. What process is used in issuing a pager?

A. The officer – once the pager was approved by a superior officer, the officer would go to Nancy Keller, and she would get them a pager from her surplus pagers she had.

Q. Did the officer have to sign any instructions or orders or receipt for the pager?

A. Not usually.

Q. Are you aware of any officer in 2002 being given any kind of instructions with respect to pager use, when they can be used, when they can't be used, prohibitions on use, approved use?

A. There's a lot of questions there. In reference to the use of it, Nancy usually – I'm referring to Nancy Keller – usually gave them a booklet that came with the pager on how to use it.

Q. Okay. What about department rules with respect to using the pager, was that given to the employees at the time they picked up the pager?

A. No.

[12] Q. What – how was the employee notified of the department's rules and regulations concerning pager use, if any existed?

A. It was my understanding that the pagers fell under the computer use policy.

Q. So was there a pager use policy in 2002 that you're aware of?

A. No.

Q. Okay. Now, in 2002, were you aware of any restrictions placed on the use of the pager for personal use?

A. I'm sorry. Can you reask that?

Q. Sure. In 2002, were you aware of any departmental restriction placed on the use of pagers concerning personal use?

A. No. I'm not aware of it.

Q. Well, let's look at the opposite side. Did the department have any policy that encouraged or permitted the use of pagers for personal use?

A. Not that I'm aware of.

Q. So from your perspective in 2002, there was no prohibition or restriction on the use of pagers for personal use?

A. Other than what was outlined in the computer use policy.

[13] Q. Okay. Now, the computer use policy –

Do you have that exhibit?

MR. MORGUESS: Not in front of me.

MR. LACKIE: We had an exhibit. We're going to get one here pretty quick.

MS. STEPHAN: How about asking questions other than those while we're waiting.

MR. LACKIE: Well, I guess we could ask a few.

Q. Was there a practice or policy with respect to overages on the billing of pagers in 2002?

A. Yes.

Q. And what was that?

A. The practice was, if there was overage, that the employee would pay for the overage that the City had.

Q. How did the City – or the police department communicate that to the employees?

A. Well, we would usually call the employee and say, "Hey, look, you're over X amount of characters. It comes out to X amount of dollars. Can you write me a check for your overage."

Q. Who was in charge of doing that?

A. I was.

(Discussion off the record.)

Q. (BY MR. LACKIE) How did you determine whether

* * *

[22] A. I'm sorry.

Q. It might be fine for the videotape, but for purposes of the transcript, where are you looking?

A. Sure. Under item I, it talks about – let me find it – electronic e-mail in the first sentence.

Q. Okay. Let me stop you there. It would probably be better if we take it line by line.

A. Okay.

Q. Did the department have its own e-mail system in 2002?

A. It's part of a City system.

Q. Okay. So there's a City-wide e-mail system?

A. That's correct.

Q. And that was run on networks operated by the City?

A. I believe so.

Q. Did the text message pagers utilize that e-mail system?

A. No.

Q. Were the text message pagers' e-mail something that went through the – to your knowledge, the network of Arch Wireless?

A. Okay. Rephrase that. I'm sorry. I got confused.

Q. The text message e-mail –

[23] A. From the pagers?

Q. From the pagers.

A. Okay.

Q. – that went through Arch Wireless, to your knowledge?

A. To my knowledge.

Q. Okay. And did you have any capability of reviewing those e-mail messages that were sent through Arch Wireless from the text pager?

A. Review them at any moment?

Q. Yes.

A. Not to my knowledge.

Q. Did you have any ability to look them up on your desktop computer or log onto Arch Wireless's network to look at a particular pager message?

A. No.

Q. Did you have the ability to have Arch Wireless send you by e-mail, transcripts of the pagers?

A. I don't know.

Q. Okay. That didn't occur, as far as you know?

A. That's correct.

Q. Okay. All right. What's the next reference in this policy, Exhibit 1?

A. To my understanding, it would be No. III, General Provisions, "The use of City-owned computer

* * *

[29] Q. Now, at any point through to today, has the department issued any amendment or addendum or directive separate to this – this, being Exhibit 1 –

telling employees that the text messages on their pagers are subject to the e-mail policy?

MS. STEPHAN: Are you including the discussion at the staff meeting or – because you didn't – I'm not sure if you're referring to the oral communications or exclusively written.

MR. LACKIE: No. I'm talking about written.

MS. STEPHAN: Okay.

THE WITNESS: Not to my knowledge.

Q. (BY MR. LACKIE) Was there any kind of general assembly of all employees during which they were told that this policy, Exhibit 1, applies to pagers?

A. Not to all employees.

Q. Okay. At some point, were employees required to sign off on any document telling them that their pages could conceivably be reviewed by the City?

A. Not to my knowledge.

Q. Even through to today?

A. Not to my knowledge.

Q. Okay. Now, separate from the e-mail policy in Exhibit 1, are you aware of any department policy or practice that permits them to review text message

pages? [30] In other words, is there some ability to do so other than the e-mail policy?

A. I would assume when we had Arch, it would be the same procedure that occurred in 2002.

Q. All right. Did the department, to your knowledge, have any rationale for being able to audit or review text messages for – based on reasoning other than the e-mail policy?

MS. STEPHAN: Mike, I'm sorry. I lost the question halfway through. Could you say it again?

MR. LACKIE: Sure.

Q. What I'm trying to find out is, you've expressed your opinion about the e-mail policy, albeit it wasn't published.

A. Yes.

Q. Is there any other policy or belief that you're aware the department had that allowed them to look at text messages?

A. Not that I'm aware of.

Q. When the City contracted with Arch Wireless, was there any discussion that you're aware of with Arch Wireless about having access to the pager messages?

A. I don't remember.

Q. Did anyone, to your knowledge, contact Arch Wireless – and this is including yourself – asking

* * *

[35] Q. Say that again. I didn't understand the answer.

A. I'm sorry. It was my understanding that Lieutenant DelRio wanted to know – or felt that messages sent during a SWAT call-out would – may be pertinent in a trial as in a shooting or something of that nature.

Q. Oh, I see. Okay.

And did you do something for Lieutenant DelRio to answer that question?

A. I believe that's when I called IT and asked them if they felt it fell under this policy.

Q. Okay. Did you call anybody else?

A. No.

Q. Did you call the department lawyers, or did you get on line to look at anything to see if there was an issue with obtaining private messages on text pagers?

A. Not that I remember.

Q. Coming back to the Chief's request that you obtain the transcripts for Quon and Glisson, was that your job to take care of?

A. Yes.

Q. Okay. And did you take care of it?

A. Yes.

Q. How did you go about doing that?

[36] A. I asked Nancy Keller to call the Arch rep and find out what we needed to do to obtain the transcripts.

Q. Do you know if she made the call?

A. Yes, she did.

Q. About when was that call made?

A. The same day or the day after I asked her, but I don't remember what day I asked her.

Q. Were you present when she made the phone call?

A. No.

Q. Did she report back to you what she learned on the phone?

A. Yes.

Q. What did she tell you?

A. She said that they didn't require anything from the agency, and they would be sending them when they had them.

Q. So a phone call was sufficient?

A. Yes.

Q. Did she say that Arch Wireless required an e-mail verification?

A. Not that I remember.

Q. Or a letter from the department?

A. Not that I remember.

Q. Did she make mention of a subpoena, search warrant, any other kinds of legal paper from the

* * *

[46] transcripts of any other employees?

A. No.

Q. Are you aware of anyone else in the department ordering transcripts for other employees?

A. Not that I'm aware of.

Q. Did anyone inform you that the transcripts were needed for purposes other than the overages?

A. Yes.

Q. And who was that?

A. I believe it was Sergeant Glenn.

Q. What did Glenn tell you?

A. Said that she would like to review them after they were dealt with, and I said, "I gave them to somebody. I don't remember who I gave them to."

Q. Did Sergeant Glenn tell you why she wanted to review them?

A. She wanted to review messages between Sergeant Quon and somebody else.

Q. Who was the somebody else?

A. I believe it was April Florio – if I'm pronouncing it correctly.

Q. April Florio?

A. Yes.

Q. Okay. And what do you know about her need to look at the messages between Quon and Florio?

* * *

[53] redacted on the other?

A. That's two questions. I knew that a set had been copied and a set had been redacted, but I don't know anything about another set, I guess. Maybe I'm confused.

Q. Okay. Do you know why there were the two sets of transcripts, one redacted and one not?

A. In reference to Glisson versus Quon?

Q. No. We're talking about Quon.

A. Okay. No, I don't.

Q. But you're aware that they existed?

A. I'm aware that a copy was made and that there was some that were redacted.

Q. All right. Do you know who made the redactions?

A. I believe Sergeant McMahon.

Q. Okay. Do you know why he made the redactions?

A. No.

Q. Did you attempt to obtain the permission of Jeff Quon to obtain his transcripts?

A. No.

Q. What about Tim Glisson?

A. No.

Q. Did you ask Jeff Quon or do you know if anybody else asked Jeff Quon to pay the overage before the [54] transcripts were ordered?

A. No.

Q. Do you know why no effort – well, no, you don't know, or no, it didn't happen?

A. No, I don't know.

Q. Did you undertake any effort to obtain payment from Quon or reimbursement from Quon for the overage prior to ordering the transcripts?

MS. STEPHAN: For just August 2002 or previously?

MR. LACKIE: For August 2002.

THE WITNESS: I don't remember.

Q. Well, now, prior to August 2002, Quon had cut checks –

A. Yes.

Q. – to reimburse the overage?

A. Yes.

Q. Do you have any understanding as to why he wasn't permitted to do that in August?

A. I think we just stopped it altogether when we were doing the audit. I don't believe I collected any checks after that.

Q. At all?

A. At all.

Q. From anybody?

A. From anybody.

[55] Q. Do you know why?

A. I think the Chief just wanted to review the transcripts to make a determination whether they had personal use versus – overage or increase the amount of characters, plus – so we just kind of stopped the practice.

Q. Did you ever tell anyone that you reviewed people's transcripts, that is, pager transcripts, all the time?

A. No.

Q. Did you have the ability to review the transcripts separate from ordering them up?

A. Those specific transcripts?

Q. No. Anybody's transcripts.

A. No.

Q. The pager messages, that is.

A. No.

Q. What was to be determined by this audit? What were you to learn by looking over the transcripts?

A. To learn how much of the characters being used was personal versus business.

Q. Okay. To what end? I mean, how would that answer any questions or solve problems?

A. Well, I would think that if a greater percentage was used for business, and then some personal

* * *

[63] A. I told him at the meeting that we discussed about pulling transcripts who they were.

Q. Okay. Now, prior to informing the Chief of the overages on Glisson and Quon, did you attend a staff meeting in which the Chief asked about transcripts for the Bors investigation?

A. Not that I remember.

Q. Were you present during a staff meeting when someone brought up the Bors investigation and transcripts?

A. Not that I remember.

Q. Did you at any staff meeting prior to the overage becoming a topic at the staff meeting – that is, at some earlier staff meeting, did you tell the Chief that transcript pagers – I mean, pager transcripts were being pulled for Lieutenant Glenn?

A. No.

Q. Was there any meeting that you recall prior to your meeting with the Chief concerning overages in which transcripts from pagers were discussed in any manner?

A. I don't remember.

Q. Now, I'd like you to take a look at what I've marked as Exhibit No. 2, which is a six-page memorandum from Chief Scharf to – I'm sorry, to Chief Scharf from Patrick McMahon, dated July 2, 2003, regarding

* * *

[69] Is that true?

A. Yes.

Q. "Because of this overage, Lieutenant Duke went to Sergeant Quon and told him the City-issued two-way pagers were considered e-mail and could be audited."

Is that true?

A. Yes.

Q. "He told Sergeant Quon it was not his intent" – and I'm assuming that McMahon is referring to you –

A. That's correct.

Q. – your intent.

– "to audit employees' text messages to see if the overage is due to work-related transmissions." Did you tell Sergeant Quon that?

A. Yes.

Q. "He" – again, referring to you, I believe – "advised Sergeant Quon he could reimburse the City for the overage so he would not have to audit the transmission and see how many of the messages were nonwork-related."

Did you, in fact, tell Sergeant Quon that?

A. Yes.

Q. And "Lieutenant Duke told Sergeant Quon he is doing this because if anybody wished to challenge their [70] overage, he could audit the text transmissions to verify how many were nonwork-related."

Is that true? Did you tell Quon that?

A. No. Not exactly.

Q. Okay. What did you tell Quon instead?

A. I think what I told Quon was that he had to pay for his overage, that I did not want to determine if the overage was personal or business unless they wanted me to, because if they said, "It's all business, I'm not paying for it," then I would do an audit to confirm that. And I didn't want to get into the bill collecting thing, so he needed to pay for his personal messages so we didn't – pay for the overage so we didn't do the audit. And he needed to cut down on his transmissions.

Q. All right. But for the August bill, you didn't provide him the opportunity to reimburse the City; correct?

A. I believe that's true.

Q. Why not? Why not just have him pay off that one month and end it?

A. I think the Chief determined he wanted to do an audit, so we didn't do that.

Q. Well, I understand that, but you're the one that told the Chief about Quon and Glisson.

A. As well as other people, yes.

[71] Q. Okay. Did you tell the Chief that you just – it simply would be better to have the employees pay the overage?

A. No.

Q. The employees hadn't refused to pay the overage at this time, had they?

A. No.

Q. Anything else going on that caused you to bring this to the Chief's attention?

A. We were just trying to be budget conscious.

Q. Wouldn't collecting the overage from the employees resolve the budget issue?

A. Sure. But it's also very labor intensive to get people to pay for overages.

Q. Had you had any collection problems?

A. I had prior to the text pagers, yes.

Q. What about with Sergeant Quon, had you had any collection problems?

A. Not that I recall.

Q. The last sentence in this paragraph says, "Lieutenant Duke added the text messages were considered public records and could be audited at any time."

Did you tell Sergeant Quon that?

A. Yes.

Q. On what basis did you conclude that text

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JEFF QUON, JERILYN QUON, APRIL FLORIO, DOREEN KLEIN and STEVE TRUJILLO, Plaintiffs, vs. ARCH WIRELESS OPERATING COMPANY, INCORPORATED, a Delaware Corporation; CITY OF ONTARIO, a Municipal Corporation; ONTARIO POLICE DEPARTMENT; LLOYD SCHARF, individually and as Chief of Ontario Police Department; DEBBIE GLENN, individually and as a Sergeant of Ontario Police Department; and DOES 1 through 20, Inclusive, Defendants. AND RELATED CROSS-ACTION.	CASE NO. EDCV 03-0199 RT (SGLx)

Deposition of: LLOYD SCHARF

Date: Monday, December 13, 2004

Starting Time: 10:08 a.m.

Location: 367 North Second Avenue
Upland, CA 91786

Reported by: Linda S. Cook
CSR No. 6583, RPR, Job No. 28647

Court Reporters of San Bernardino
715 North Arrowhead Avenue, Suite 212
San Bernardino, California 92401
(909) 885-4017 – FAX (909) 884-0555

* * *

[8] would be yes.

Q. Okay. And what did you tell him?

A. I asked him to pull the top two and determine if they were used on duty or for off duty. My concern was –

MS. STEPHAN: You've answered the question.

THE WITNESS: I'm sorry.

Q. (BY MR. LACKIE) What were your concerns?

A. That it was work-related. I didn't want someone playing games or – on company time.

Q. Was there a policy in place to allow officers to pay for overages on the pager usage?

A. I believe so.

Q. And what was your understanding about that policy?

A. That the officers paid for their overages.

Q. When Sergeant – I'm sorry – Lieutenant Duke came to you – well, he may have been a sergeant at the time. But when Duke came to you, did he tell you whether the officers had paid the overages that were concerning him?

A. Yes.

Q. So at that point, it wasn't an issue of bills being unpaid; is that correct?

A. That's correct.

* * *

[12] Q. What was that?

A. Determine if the usage was on duty or off duty.

Q. All right. What difference did that make?

A. If it was on duty and not work-related, my concern was that someone was wasting a lot of City time conversing with someone about nonrelated work issues.

Q. Okay. Did you give at that time any consideration to the fact that the text messages may contain personal messages or paging text from people not employed by the City of Ontario?

A. No.

Q. You say you didn't think about it one way or the other?

A. That's correct.

Q. Now, did Lieutenant Duke report back to you after you spoke to him in 2002 telling him to pull the top two?

A. Yes.

Q. Okay. And when was that?

A. I don't recall.

Q. Approximately how long after the first conversation you had with him concerning text-message pagers do you think he got back to you? I'm asking for your best estimate.

A. Weeks.

* * *

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JEFF QUON, JERILYN QUON, APRIL FLORIO, DOREEN KLEIN and STEVE TRUJILLO, Plaintiffs, vs. ARCH WIRELESS OPERATING COMPANY, INCORPORATED, a Delaware Corporation; CITY OF ONTARIO, a Municipal Corporation; ONTARIO POLICE DEPARTMENT; LLOYD SCHARF, individually and as Chief of Ontario Police Department; DEBBIE GLENN, individually and as a Sergeant of Ontario Police Department; and DOES 1 through 20, Inclusive, Defendants. AND RELATED CROSS-ACTION.	CASE NO. EDCV 03-0199 RT (SGLx)

Deposition of: PATRICK McMAHON

Date: Monday, December 13, 2004

Starting Time: 1:59 p.m.

Location: 367 North Second Avenue
Upland, CA 91786

Reported by: Linda S. Cook
CSR No. 6583, RPR, Job No. 28647

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* * *

[57] understand that.

MR. RINOS: Already with you asking questions, it's cooler.

MR. MORGUESS: Well, I haven't gotten started.

Q. All right. You were talking about a meeting where Lieutenant Duke said, "I'm tired of being a bill collector." Do you remember that? Do you remember your testimony in that regard?

A. Yes.

Q. Do you know what he meant in that regard?

A. Yes.

Q. What was he talking about, as far as you know?

A. To go around to the people that have gone over their allotted characters on their text pagers and basically having them pay for any overages.

Q. And that was something that he was responsible to handle?

A. To my knowledge, correct. Yes.

Q. Okay. Had he ever had that kind of interaction with you?

A. No.

Q. Okay. You said that the chief responded, "Is there anything" – "Could we audit them?" What did you say that he said?

A. From what I recall, the chief asked [58] Lieutenant Duke is there a way to audit the text pagers to find out what is being sent. He indicated that we had not had a tremendous amount of S.W.A.T. call-outs or issues that he was aware of that required the guys to be using these text pagers to go beyond the allotted characters.

Q. And did Sergeant – how did Sergeant Duke respond to that?

MR. DISENHOUSE: Lieutenant Duke?

MS. STEPHAN: Lieutenant Duke.

Q. (BY MR. MORGUESS) Lieutenant Duke. Excuse me.

A. He said that he would look into it and find out if he could audit and actually receive a copy of the text transmissions.

Q. Was that the end of that discussion?

A. That was pretty much all for that day.

Q. All right. When you were handed the audit – and you used the term "the audit" – what were you asked to do?

A. To determine if there was a misuse of departmental equipment.

Q, So there was no charge necessarily?

MS. STEPHAN: I'm sorry. I don't understand.

THE WITNESS: Yeah.

Q. (BY MR. MORGUESS) Well, you're in the [59] investigations department; right?

A. Correct.

Q. Do you usually just handle investigations of alleged misconduct or suspected misconduct?

A. Yeah. Violations of rules and regulation, general orders, City policies/procedures.

Q. So when you were handed the audit, were you told, "We believe there's a violation of something"?

A. Yes.

Q. And what was that?

A. The misuse of departmental equipment.

Q. And what was the misuse?

A. The amount of time that – or the amount of characters that were over, how much this was done on departmental time, how much this was done off duty time.

Q. So all those things were communicated to you as you were given the investigation?

A. Correct.

Q. Okay. Who made the decision to redact the transcripts?

A. I'm not sure how that came up. I believe it was – for purposes of clarification, it was just easier to have those lines erased or crossed out so we could just look upon – or I could look at how many were actually done during on-duty time.

* * *

[63] A. I would look at the date and time, probably put a mark by that one, and then go down to wherever it was that either began – or where he first began his shift and put another line, so that basically everything between the two lines that I had put down was from the end of his prior shift to the beginning of his next shift, and all the stuff in between there, I would put a black line through the date, time, and the text transmission, because for the purposes that I was focusing on, it was irrelevant for my investigation. I focused just on what was going on during on-duty time.

Q. By the time Sergeant Glenn – or is it Lieutenant Glenn now? –

A. It's Lieutenant Glenn now.

Q. – got involved, had you marked those beginning and end points for the entire however many pages the transcripts ended up being, or would you just mark one section, black it out, then get to the next section, find the beginning and end point?

A. That's what I don't recall. I don't remember if I had it set up prior to – just where all she had to do is line out between my two marks or if she actually had to take the time sheet and match that up to the portion of the text transmission that she had.

Q. Did you have any discussions during this entire [64] time?

A. Yes.

Q. Did you have any discussions about this investigation, the Quon investigation?

A. I would imagine so.

Q. Do you recall the content of any of those conversations?

A. Not at this time.

Q. Did you talk about any of the transmissions in the audit?

A. Yes.

Q. Okay. What did you talk about?

A. That some were personal and some were not.

Q. Did she ever laugh at any of the transmissions?

A. I don't ever recall her laughing, no.

Q. Did she make comments about any of the transmissions?

A. Other than that they were not work-related, I don't recall.

Q. You said she made a phone call to one of the numbers that were on the transmissions; right?

A. Correct.

Q. Okay. Do you know what number she dialed?

A. No, I do not.

Q. Did you say anything to her as she did that?

[65] A. No, I did not.

Q. Did you think it was appropriate that she did that?

A. I was a little surprised by it.

Q. Did you think it had any investigative value, what she was doing?

A. No.

Q. But you didn't say anything to her?

A. No.

Q. Did you say anything to anybody else about that?

A. Yes, I have.

Q. And who was that?

A. I have spoken to attorneys.

Q. Okay. Don't tell me what you said to the attorneys.

MR. LACKIE: Well, wait a minute. I might want to know. I'm teasing.

Q. (BY MR. MORGUESS) Unless they'll let you.

MR. LACKIE: That's right.

Q. (BY MR. MORGUESS) Have you spoken with the attorneys about anybody else?

MR. RINOS: That's –

MS. STEPHAN: Attorney-client privilege.

MR. LACKIE: Anybody else that he's talked to about

* * *

[67] A. A department phone, I believe.

Q. Did she look at you afterwards, kind of – I don't know – guiltily or something? Did you make eye contact afterwards?

A. I don't recall.

Q. Okay. Do you know if the number she called was one of the on-duty or off-duty transmissions?

A. No, I do not.

Q. How did you know that it was one of the numbers from the transmission?

A. Because she had the transmission right in her hand.

Q. Okay. Was that the only time, as far as you know, that she made a phone call from the transmission page?

A. Yes.

Q. Was there any time that you had left her alone with the transcripts, the audit? Did you get up to go to the bathroom, talk to somebody else?

A. Well, the – I guess the answer would be yes.

Q. Okay. What do you remember about that?

A. Well, the – when it was not on my desk, it was locked in the cabinet right behind my desk, and I believe she also had a key for that cabinet.

Q. So she had access to it; is that right?

* * *

[72] Q. What do you mean?

A. When the city clerk receives an e-mail, to cut down on the paperwork now, they just make a copy of it and e-mail it to the people it has to go to.

Q. So you receive I.A. workshop updates?

A. Updates.

Q. Contacts with other agencies?

A. Correct. Also, interagency within the depar- – within the City itself, too.

Q. Within the City. Okay. Do you ever receive I.A. workshop update information on your wireless text-message pager?

A. No.

Q. How about contact with other agencies?

A. At – now, at this time, very rarely, but I do receive one once in a great while.

Q. What do you use your text-message pager for?

A. At this point in time? Just whenever one of the detectives has to get ahold of me or has a question for me, sometimes it's easier to text me as opposed to trying to get me on these Nextels.

Q. So you use it instead of cell phone transmissions?

A. At times, if it's a quick, easy one. If someone is going to be late from work – or for work,

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
EASTERN DIVISION

HONORABLE STEPHEN G. LARSON,
JUDGE PRESIDING

JEFF QUON, PLAINTIFF, VS. ARCH WIRELESS, INC., ET AL., DEFENDANTS.	)	NO. ED CV 03-0199-SGL MOTIONS FOR SUMMARY JUDGEMENT

REPORTER'S TRANSCRIPT OF PROCEEDINGS

RIVERSIDE, CALIFORNIA

MONDAY, JUNE 26, 2006

10:18 A.M.

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[3] RIVERSIDE, CALIFORNIA; MONDAY, JUNE 26, 2006; 10:18 A.M.

THE CLERK: CALLING CALENDAR ITEM 11, THE MATTER OF PLAINTIFF JEFF QUON, ET. AL., VERSUS DEFENDANTS ARCH WIRELESS, INC., ET. AL., CASE NUMBER ED CV 03-199.

MAY WE HAVE COUNSEL COME FORWARD AND STATE YOUR APPEARANCES FOR THE RECORD.

MR. MORGUESS: MICHAEL MORGUESS FOR PLAINTIFFS.

MR. DISENHOUSE: BRUCE DISENHOUSE ON BEHALF OF SERGEANT DEBBIE GLENN.

MS. STEPHAN: LAURA STEPHAN FOR THE CITY OF ONTARIO, ONTARIO POLICE DEPARTMENT, AND CHIEF LLOYD SCHARF.

MR. MARTIN: TOM MARTIN ON BEHALF OF DEFENDANT ARCH WIRELESS OPERATING COMPANY.

THE COURT: GOOD MORNING.

WE'RE ON CALENDAR THIS MORNING FOR THE SECOND MOTION FOR SUMMARY JUDGEMENT, A FOLLOWUP TO THE FIRST MOTION FOR SUMMARY JUDGEMENT WHICH THE COURT GRANTED IN PART AND DENIED IN PART.

I HAVE A SERIES OF QUESTIONS ACTUALLY FOR ALL COUNSEL. I'D LIKE TO BEGIN WITH THE PLAINTIFF'S COUNSEL, IF YOU WOULD APPROACH THE LECTERN.

MR. MORGUESS: THANK YOU.

THE COURT: WHAT I'D LIKE TO ADDRESS FIRST ARE TWO OF THE INDIVIDUAL DEFENDANTS, ARCH WIRELESS AND DEBBIE GLENN.

[4] LET'S BEGIN WITH ARCH WIRELESS.

THE COURT HAS SPENT MORE TIME THAN IT PROBABLY THOUGHT IT WOULD HAVE TO WITH THIS PARTICULAR STATUTE. THERE'S A PROVISION IN THE STATUTE WHICH NEITHER PARTIES ADDRESSED, WHICH I THINK IS A PRETTY CLEAR INDICATION BY CONGRESS THAT IT EXPECTS THE STATUTE IN QUESTION TO PREEMPT OR OCCUPY THE ENTIRE FIELD.

I'M REFERRING, OF COURSE, TO THE STORED WIRED AND ELECTRONIC COMMUNICATIONS AND TRANSACTIONAL RECORDS ACCESS ACT, OR THE 'STORED WIRED ACT,' AS WE HAVE BEEN REFERRING TO IT. SECTION 2708 REFERS TO THE TITLE "EXCLUSIVITY OF REMEDIES." THE REMEDIES AND SANCTIONS DESCRIBED IN THIS CHAPTER ARE THE ONLY JUDICIAL REMEDIES AND SANCTIONS FOR NONCONSTITUTIONAL VIOLATION IN THIS CHAPTER, WHICH WOULD SEEM, BY ITSELF, TO

EXCLUDE YOUR STATE CLAIM AGAINST ARCH WIRELESS, UNLESS THERE'S SOMETHING I'M MISSING.

MR. MORGUESS: WELL, I RESPECTFULLY DISAGREE, YOUR HONOR.

I THINK THAT ONLY TALKS ABOUT VIOLATIONS, WHEN IT SAYS 'EXCLUSIVE REMEDIES FOR VIOLATIONS OF THIS CHAPTER,' IT'S ONLY REFERRING TO VIOLATIONS OF THAT CHAPTER UNDER THE ECPA AND THE STORED COMMUNICATIONS ACT.

WE'RE NOT ALLEGING, AS FAR AS THE PRIVACY CLAIM, THAT THAT'S A VIOLATION OF THAT CHAPTER. WE'RE ALLEGING THAT IT'S A VIOLATION OF STATE LAW, SOMETHING COMPLETELY DIFFERENT.

[5] THE COURT: HOW ARE THE VIOLATIONS IN SUBSTANCE ANY DIFFERENT?

I UNDERSTAND YOU HAVE A DIFFERENT NOMENCLATURE TO DESCRIBE IT, BUT HOW IN SUBSTANCE IS THE VIOLATION ANY DIFFERENT THAN WHAT YOU'RE CLAIMING IS A VIOLATION OF THE STATUTE?

MR. MORGUESS: IN SUBSTANCE IT'S DIFFERENT BECAUSE IT'S BASED ON AN ENTIRELY DIFFERENT STATUTE, LAW, STATE CONSTITUTION.

THE COURT: THAT'S NOT THE SUBSTANCE OF THE CLAIM.

HOW IS THE SUBSTANCE OF THE CLAIM ANY DIFFERENT?

MR. MORGUESS: WELL, OUR FIRST CAUSE OF ACTION WAS BASED ON A SPECIFIC VIOLATION OF, I THINK IT WAS 2702 OR 2703 UNDER THE STORED COMMUNICATIONS ACT.

THE COURT: WHICH ARGUED, IN SUBSTANCE, WHAT?

MR. MORGUESS: THAT THE ACT DID NOT PERMIT THE TRANSCRIPTS TO BE DISCLOSED SIMPLY TO THE SUBSCRIBER UNDER THE CIRCUMSTANCES THAT WE ALLEGED AND THOUGHT WE PROVED.

UNDER THE STATE CLAIM, THERE IS AN ADDITIONAL PRIVACY CLAIM BASED ON A REASONABLE EXPECTATION OF PRIVACY, THE SERIOUS NATURE OF THE INVASION THAT WAS, IN PART, CREATED BY – OR THAT WAS CREATED BY THE EMPLOYER, THE CITY IN THIS CASE, WHO ARCH HAS A CONTRACT WITH.

THE COURT: WAS NOT THE PURPOSE OF THE STATUTE TO PROTECT PRIVACY IN THESE COMMUNICATIONS? OR AT LEAST THOSE [6] PROVISIONS OF THE STATUTE THAT YOU REFER TO?

MR. MORGUESS: IT SEEMS TO ADDRESS THE SERVICE PROVIDER'S – THE LIMITS OF THEIR, I GUESS, DISCRETION OR PERMISSIBLE CONDUCT AS FAR AS DISCLOSING THE TRANSCRIPTS UNDER THE ACT.

THE COURT: TO AVOID INVASIONS OF PRIVACY.

MR. MORGUESS: I SUPPOSE.

THE COURT: WHAT OTHER PURPOSE, COUNSEL?

MR. MORGUESS: TO AVOID, I WOULD SAY, INVASIONS OF PRIVACY; ALTHOUGH I DON'T KNOW THAT IT'S INVASIONS OF PRIVACY ON THE STATE CONSTITUTIONAL ORDER. BUT IN GENERAL TERMS, YES, AN INVASION OF PRIVACY.

THE COURT: LIKE THE COURT, YOU CAN'T THINK OF ANY OTHER PURPOSE FOR THAT.

MR. MORGUESS: LIKE THE COURT . . .

THE COURT: WHAT I'M SAYING IS I CAN'T THINK OF ANY OTHER PURPOSE FOR THE ACT, OTHER THAN TO PROTECT THE PRIVACY. AND FROM WHAT I'M HEARING, YOU'RE NOT THINKING OF ONE EITHER.

MR. MORGUESS: I AGREE THAT IT IS AS FAR AS THAT STATUTE GOES. BUT HERE THERE WAS SOMETHING IN ADDITION; THERE

WAS WHAT THE EMPLOYER CREATED IN THE EMPLOYEE. WHEN ARCH HANDS OUT ONE HUNDRED PAGERS TO AN ENTITY, THERE IS SOMETHING ELSE GOING ON THERE; THIS IS NOT JUST ONE PERSON WHO HAS A CONTRACT WITH ARCH AND THEY ARE SUBSCRIBING TO ARCH AND THEY ARE ASKING FOR THE DISCLOSURE OF THE TRANSCRIPTS. THIS IS ARCH GIVING OUT [7] ONE HUNDRED, OR MAYBE MORE, PAGERS TO EVERY CITY EMPLOYEE. I MEAN, THERE'S SOMETHING ELSE GOING ON THERE BETWEEN THE EMPLOYEE AND THE EMPLOYER THAT ARCH COULD CARE LESS ABOUT. AND WE BELIEVE THAT WHEN THEY ARE GOING TO TAKE ADVANTAGE OF THE RELATIONSHIP AND THE ABILITY TO MAKE A LOT OF MONEY OFF OF AN ENTITY LIKE THE CITY BY GIVING OUT SO MANY PAGERS THAT THEY KNOW ARE GOING TO BE GIVEN OUT TO INDIVIDUALS, THEY HAVE A DUTY TO SEE WHAT'S GOING ON BETWEEN THEM BEFORE THEY DISCLOSE THOSE TRANSCRIPTS.

THE COURT: THE RELATIONSHIP IS BETWEEN ARCH AND THE CITY; IT'S NOT WITH THE INDIVIDUAL POTENTIAL CONSUMERS.

MR. MORGUESS: THERE MAY BE SOME KIND OF THIRD PARTY THING GOING ON THERE WHEN THEY KNOW THAT THE CITY, THAT THE ENTITY THEY ARE CONTRACTING WITH, IS GOING TO BE HANDING OUT ALL OF THESE PAGERS TO INDIVIDUALS.

THE COURT: IS THE CITY IN ANY WAY REQUIRED TO DISCLOSE TO ARCH WIRELESS WHO AND IF THEY ARE ACTUALLY GIVING THEM TO DIFFERENT EMPLOYEES?

MR. MORGUESS: I BELIEVE THAT ARCH KEPT THE NAMES OF THE INDIVIDUALS THAT THE PAGERS WERE ASSIGNED TO; SO ARCH KNEW THAT WAS GOING ON.

THE COURT: ALL RIGHT.

MR. MORGUESS: I THINK ARCH ASSUMES THAT, AND THAT'S THE VERY REASON IT DOES THAT.

THE COURT: WITH RESPECT TO DEFENDANT DEBBIE GLENN, [8] WHAT IS HER INVOLVEMENT IN –

WHAT THE COURT RULED IN ITS LAST ORDER WAS THAT THE DISCLOSURE OF THE CONTENTS OF THE PAGERS – AS OPPOSED TO JUST THE CONFISCATION OF THE PAGERS – BUT THE DISCLOSURE OF THE CONTENTS OF THE PAGERS, MAY HAVE VIOLATED A FOURTH AMENDMENT RIGHT PREDICATED ON A REASONABLE EXPECTATION OF PRIVACY.

WHAT IS DEFENDANT DEBBIE GLENN'S INVOLVEMENT, IF ANY, IN THE DISCLOSURE OF THE CONTENTS OF THE PAGERS, AS OPPOSED TO SIMPLY TAKING THE PAGERS BACK FROM THE TWO EMPLOYEES IN QUESTION?

MR. MORGUESS: WELL, THERE'S A CONFLICT IN THE EVIDENCE AS TO EXACTLY WHAT HER INVOLVEMENT IS.

WE BELIEVE, ASIDE FROM WHATEVER EVIDENCE MAY HAVE BEEN IN FRONT OF THE COURT IN THE MOTION FOR SUMMARY JUDGEMENT, THAT SHE ALSO DISCLOSED THEM TO OTHERS IN THE DEPARTMENT, NOT IN SOME TYPE OF INVESTIGATIVE CAPACITY –

THE COURT: DISCLOSED THE TRANSCRIPTS?

MR. MORGUESS: AND THE CONTENTS OR THE ACTUAL TRANSCRIPTS OF THE CONTENTS; AND BASICALLY THAT DEPARTMENT WAS GETTING A BIG LAUGH OUT OF EVERYTHING THAT WAS IN THE TRANSCRIPTS.

THE COURT: IS THERE ANY EVIDENCE BEFORE THE COURT ON THAT POINT?

MR. MORGUESS: NOT BEFORE THE COURT.

BUT WHEN YOU FIRST CALLED THE CASE, YOU MENTIONED [9] THAT THESE WERE MOTIONS FOR SUMMARY JUDGEMENT, AND EVERYBODY HAD CALLED THEM MOTIONS FOR JUDGMENT ON THE PLEADINGS SO WE DIDN'T SUBMIT ANY ADDITIONAL EVIDENCE OR DECLARATIONS OR ANYTHING LIKE THAT THAT WOULD ADD TO WHAT WAS BEFORE THE COURT; SO I DON'T KNOW IF THE COURT'S

TREATING THEM AS MOTIONS FOR SUMMARY JUDGMENT OR . . .

THE COURT: VERY WELL. I APPRECIATE YOUR DISTINCTION.

BESIDES THIS ALLEGATION THAT SHE DISCLOSED THEM, ANY OTHER INVOLVEMENT IN THE ACTUAL CONTENTS OF THE PAGERS?

MR. MORGUESS: THERE'S EVIDENCE THAT SHE LOOKED AT SOME OF THE NUMBERS AND ACTUALLY CALLED THE PEOPLE WHOSE NUMBERS THEY WERE; MAYBE NOT KNOWING WHO THEY WERE, OR MAYBE SHE DID. AND SOME OF THAT EVIDENCE, I THINK, IS BEFORE THE COURT; AT LEAST THAT SHE LOOKED AT IT AND MAYBE PICKED UP HER OWN PHONE AND CALLED SOME OF THE NUMBERS THAT WERE ON THE TRANSCRIPTS.

BUT WE HAVE OTHER EVIDENCE THAT'S NOT BEFORE THE COURT THAT SHE CALLED MORE THAN JUST ONE, FOR INSTANCE.

THE COURT: VERY GOOD. THANK YOU, COUNSEL.

MR. DISENHOUSE, WHY DON'T YOU SPEAK TO YOUR CLIENT, DEBBIE GLENN.

MR. DISENHOUSE: YOUR HONOR, THE ONLY EVIDENCE THAT'S BEFORE THE COURT, WHETHER IT'S IN THIS MOTION OR IN THE PRIOR SUMMARY JUDGEMENT MOTION, IS

THAT AS PART OF THE ADMINISTRATIVE [10] INVESTIGATION INTO JEFF QUON'S USAGE OF HIS PAGER, SERGEANT GLENN WAS INVOLVED IN REDACTING THE NON-WORK-RELATED MESSAGES TO ASSIST SERGEANT MCMAHON, WHO WAS ASSIGNED THAT INVESTIGATION, IN COMPLETING THAT TASK.

THERE WAS A SUGGESTION THAT SERGEANT GLENN HAD ACCESSED THE PAGERS OF DOREEN KLINE AND APRIL FLORIO, BUT THERE'S NO EVIDENCE THAT OCCURRED.

THERE IS NOTHING, REGARDLESS OF WHAT COUNSEL IS SUGGESTING TO THE COURT, THAT INDICATES THAT WHAT SERGEANT GLENN DID EVER CAME OUTSIDE OF THE SCOPE OF ADMINISTRATIVE INVESTIGATIONS, FOR WHICH SHE SHOULD BE IMMUNIZED UNDER GOVERNMENT CODE SECTION 821.6.

THE COURT: I DON'T KNOW WHO WANTS TO SPEAK ON BEHALF OF THE DEFENDANTS, OR IF YOU BOTH WANT TO SPEAK; I'LL CERTAINLY GIVE YOU THAT OPPORTUNITY. THIS GETS TO THE HEART OF THE MATTER OF THESE MOTIONS IS THIS NOTION OF QUALIFIED IMMUNITY FOR THE OFFICERS IN QUESTION.

THE COURT HAS FOUND THERE WAS A REASONABLE EXPECTATION OF PRIVACY HERE. THE COURT IS FOCUSING NOW AS TO THE REASONABLENESS OF THE SCOPE OF THE

SEARCH AND WHETHER OR NOT IT WAS CLEARLY ESTABLISHED AT THE TIME THAT THEY CONDUCTED THE SEARCH THAT SUCH PRIVACY INTERESTS EXISTED.

YOU BOTH URGED THE COURT TO CONSIDER THIS BOHACH CASE OUT OF NEVADA. THE TROUBLING ASPECT THAT I'M HAVING IS THAT WHAT WE HAVE HERE IS NOT A SITUATION THAT THE CITY CAN SIMPLY [11] RELY UPON A CLEARLY STATED OR CLEARLY MEMORIALIZED RULE WITH RESPECT TO THE AUDITING OF THESE PAGERS. WE HAVE THIS LIEUTENANT DUKE FACTOR, FOR LACK OF A BETTER PHRASE, IN WHICH HE SEEMS, AT LEAST ON INTERPRETING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE PLAINTIFF, CLEARLY TO SUGGEST TEAT HE ALTERED WHATEVER POLICY OR UNDERSTANDING EXISTED BETWEEN ONTARIO AND ARCH WIRELESS AND CLEARLY STATED THAT AS LONG AS YOU PAID THE OVERAGES FOR GOING OVER EACH MONTH, THE AMOUNT OF MONEY THAT WAS BEING CHARGED BY ARCH WIRELESS FOR THE USE OF THE PAGERS, THAT HE WAS NOT GOING TO CONDUCT AN AUDIT.

AND GIVEN THE FACT THAT THERE DOESN'T SEEM TO BE ANY QUESTION THAT THESE INDIVIDUALS WERE WILLING TO PAY THE OVERAGES, OR AT LEAST WERE NOT CONTESTING THOSE, THAT'S THE RULE; THAT'S THE RULE THAT WAS ESTABLISHED

BETWEEN THE CITY OF ONTARIO; THAT WAS THEIR POLICY. AND IT'S IN LIGHT OF THAT POLICY THAT A CLEAR VIOLATION OR A VIOLATION SEEMS TO ARISE IN THIS CASE.

THE PURPOSE FOR WHICH THE AUDITS WERE CONDUCTED – AND THAT'S ONE OF THE QUESTIONS I WANT TO PIN DOWN HERE TODAY, BECAUSE YOU SEEM TO KIND OF ARGUE MIXED PURPOSES HERE, AND I REALLY WANT TO GET A CLEAR STATEMENT FROM THE DEFENDANT AS TO WHAT THE PURPOSE FOR THE AUDIT OR THE SEARCH WAS – NEEDS TO BE EVALUATED IN LIGHT OF THE POLICY AS IT EXISTED, MAINLY LIEUTENANT DUKE'S POLICY, AND NOT THE PREVIOUSLY WRITTEN POLICY.

[12] SO MR. DISENHOUSE, OR COUNSEL, OR WHOEVER WANTS TO ADDRESS THESE POINTS MAY.

MR. DISENHOUSE: THAT ARGUMENT REALLY GOES MORE TO THE CITY'S ISSUE.

WHAT I WANTED TO TRY TO GET ACROSS, YOUR HONOR, IS THAT DEBBIE GLENN WAS SUED ONLY UNDER STATE LAW. AS THIS COURT KNOWS, I CAN'T ALLEGE A STATE LAW BASED IMMUNITY TO DEAL WITH THE FOURTH AMENDMENT CLAIM THAT THIS COURT FOUND WAS POTENTIALLY AN ISSUE. BUT THE STATE LAW IMMUNITY APPLIES, NOTWITHSTANDING WHATEVER FEDERAL VIOLATION THIS COURT MAY CONCLUDE HAS OCCURRED, SIMPLY

BECAUSE UNDER STATE LAW THE IMMUNITY APPLIES WHETHER THE CONDUCT WAS WRONGFUL, EVEN MALICIOUS, ACCORDING TO THE CASE LAW THAT'S INTERPRETED THE BROAD SCOPE OF THE IMMUNITY UNDER GOVERNMENT CODE SECTION 821.6.

I UNDERSTAND THE COURT'S ANALYSIS BASED ON THE FOURTH AMENDMENT AND THE REASONABLE EXPECTATION OF PRIVACY. BUT, RESPECTFULLY, THAT'S COMPARING APPLES WITH ORANGES WHEN YOU SIMPLY LOOK AT THE STATE LAW AND AT THE AMY LU CASE AND WHAT IT TALKS ABOUT. IT DOESN'T MATTER WHETHER THE CONDUCT WAS WELL INTENTIONED OR OTHERWISE. IT DOESN'T MATTER IF THE SCOPE OF THE INVESTIGATION GOES FAR BEYOND THE ACTUAL TARGET SO THAT YOU INVOLVE NONPARTIES. AS LONG AS IT'S UNDERTAKEN AS PART OF AN ADMINISTRATIVE INVESTIGATION, IT'S THE END OF THE ANALYSIS IF YOU FOLLOW THE BROAD SCOPE OF IMMUNITY THAT'S PROVIDED UNDER [13] GOVERNMENT CODE SECTION 821.6.

THE COURT: LET ME ASK YOU TO ANSWER THAT LAST QUESTION. WHAT WAS THE INVESTIGATION,

MR. DISENHOUSE: THE INVESTIGATION WAS TO DETERMINE WHETHER OR NOT

JEFF QUON'S USAGE OF THE PAGER WAS WORK RELATED OR NOT.

THE COURT: FOR WHAT PURPOSE?

MR. DISENHOUSE: TO DETERMINE IF, AS I UNDERSTAND IT, IF IT WAS WORK RELATED, WAS THERE A NEED TO INCREASE THE CHARACTER LIMIT?

THE COURT: SO THIS ALL RELATES TO THE CHARACTER ALLOTMENT; THIS HAS NOTHING TO DO WITH THE ALLEGATIONS OF MISCONDUCT THAT WERE GOING ON IN THE DISPATCH CENTER.

MR. DISENHOUSE: THE DISPATCHER INVESTIGATION AT THAT MOMENT IN TIME WAS OVER.

THE COURT: THAT'S CLEAR THAT THERE'S NO CONNECTION BETWEEN THOSE TWO.

MR. DISENHOUSE: NO. THEY ARE NOT RELATED.

THE COURT: VERY WELL.

MS. STEPHAN: I THINK ACTUALLY THE ONLY RELATION WITH THE DISPATCH AND THE PAGER IS THE FACT THAT JEFF QUON WAS DATING ONE OF THE DISPATCHERS, APRIL FLORIO.

THE COURT: BUT THAT WASN'T THE PURPOSE OF THIS INVESTIGATION.

MS. STEPHAN: RIGHT. BUT THERE WAS – IN A BROAD [14] SENSE, THEY WERE RELATED ONLY BECAUSE THERE WAS A BOYFRIEND/GIRLFRIEND SITUATION GOING ON BETWEEN THOSE TWO.

THEY WERE NOT, HOWEVER, INVESTIGATING – SERGEANT DEBBIE GLENN AND SERGEANT MCMAHON WERE NOT INVESTIGATING WHETHER OR NOT THE RELATIONSHIP BETWEEN THOSE TWO PROMPTED THE DISPATCHERS WITH THE HELL'S ANGELS' INVESTIGATION WAS RELATED TO JEFF QUON. THEY HAD NO INDICATION FOR THAT.

THE COURT: BUT IF THERE'S NO PROBLEM HERE, IF EVERY MONTH PEOPLE ARE PAYING FOR THEIR OVERAGES AND THEY ARE INDICATING WHETHER OR NOT IT'S PERSONAL OR BUSINESS, NO ONE IS ASKING FOR MORE ALLOCATION OF CHARACTER NUMBERS, WHY DOES THE CITY HAVE TO GO AND DO AN AUDIT OF THESE TWO INDIVIDUAL PAGERS AND LOOK AT THEIR CONTENTS AND MAKE THIS INDEPENDENT DETERMINATION IF THERE'S NO GRIPING BY THE PEOPLE WHO ARE ACTUALLY PAYING FOR THE OVERAGES?

MS. STEPHAN: THERE WAS GRIPING BY LIEUTENANT DUKE; HE WAS THE LIEUTENANT IN CHARGE OF, AT THAT POINT IN

TIME, OPENING A NEW POLICE STATION; THEY WERE MOVING FROM ONE LOCATION TO ANOTHER; AND HE WAS "TIRED OF BEING A BILL COLLECTOR." HE WOULD GO TO THESE TWO OFFICERS EVERY MONTH AND HAVE TO ASK THEM FOR THE BILLS; AND THE PAYMENTS WOULD THEN GO TO ACCOUNTING; AND THE ACCOUNTING WOULD THEN HAVE TO PAY ARCH WIRELESS THE EXTRA.

THE COURT: THEN WHY NOT SIMPLY ASK THESE PEOPLE, "YOU'RE PAYING EXTRA BILLS EVERY MONTH; HOW MUCH OF THIS IS [15] PERSONAL? HOW MUCH OF THIS IS BUSINESS? DO WE NEED TO INCREASE IT?"

WHY DO WE NEED TO DO THIS AUDIT? ISN'T THERE A LESS RESTRICTIVE ALTERNATIVE TO OBTAINING THE LEGITIMATE OBJECTIVE THAT YOU ARTICULATED HERE SHORT OF TAKING PEOPLE'S PERSONAL – YOU UNDERSTAND GOING IN THAT YOU ARE LIKELY TO FIND PERSONAL COMMUNICATIONS, BECAUSE THAT'S THE WHOLE ISSUE; RIGHT?

MS. STEPHAN: CORRECT.

THE COURT: INSTEAD OF GOING IN AND LOOKING AT THOSE PERSONAL COMMUNICATIONS, ISN'T THERE A LESS INTRUSIVE WAY OF DOING THIS?

MS. STEPHAN: WELL, ASKING THE OFFICERS WOULD BE A LESS INTRUSIVE MANNER. HOWEVER –

THE COURT: WHICH IS A MANNER THAT YOU HAVE RELIED UPON, LIEUTENANT DUKE HAS RELIED UPON, UP TO THIS POINT; CORRECT?

MS. STEPHAN: HE HAD ASSUMED THEY WERE PERSONAL, AND THAT'S WHY HE WAS JUST ASKING THEM TO PAY, NOT ASSUMING THAT THEY HAD BUSINESS RELATIONS.

THE COURT: CORRECT.

YOU HAVE A PATTERN OF RELYING UPON THE OFFICERS' CREDIBILITY OR RELIABILITY UP TO THIS POINT. WHY, ALL OF A SUDDEN NOW, YOU DON'T TRUST THE OFFICERS AND YOU HAVE TO SEE THE CONTENTS OF THE COMMUNICATIONS THEMSELVES?

MS. STEPHAN: WELL, ACTUALLY, IF YOU WOULD GET UP TO [16] 25,000 – FOR EXAMPLE, ASSUMING THAT THERE IS PERSONAL AND BUSINESS ON THE TEXT MESSAGE PAGERS –

THE COURT: YOU KNOW THERE IS BECAUSE THEY HAVE BEEN PAYING FOR IT FOR THE MONTHS LEADING UP TO THIS.

MS. STEPHAN: ASSUMING THAT, HOW MUCH IS BUSINESS VERSUS PERSONAL? I

DON'T KNOW THAT AN INDIVIDUAL WOULD BE ABLE TO SAY IT'S 50 PERCENT THIS, 50 PERCENT THAT. AND THEN TO DETERMINE WHETHER OR NOT THE OFFICERS WERE COMING CLOSE TO THE 25,000 CHARACTERS, AND THEN WOULD WE HAVE TO HAVE THEM LIMIT – TRY NOT TO GO OVER THE 25,000 IN BUSINESS AND THEN PERSONAL OTHERWISE?

IT JUST MAKES IT EASIER, I BELIEVE, TO LOOK AT THEM, MARK OUT THE THINGS THAT ARE PERSONAL IN NATURE, AND FIGURE OUT IF THEY ARE HITTING THE 25,000.

I MIGHT ALSO POINT OUT THAT AT NO TIME DID WE CONTACT – WELL, WITHDRAW THAT.

WE DID NOT CONTACT JEFF QUON. WE DID NOT GO THROUGH HIS DESK. WE DID NOT LOOK AT HIS TEXT PAGER. WE CONTACTED ARCH WIRELESS. WE CONTACTED A THIRD PARTY WHO MAINTAINS AND HAS ACCESS TO THEM.

THE COURT: THAT'S ALMOST WORSE, ISN'T IT? FROM A PRIVACY STANDPOINT?

AT LEAST IF JEFF QUON KNEW WHAT YOU WERE DOING, HE COULD OFFER AN EXPLANATION.

MS. STEPHAN: INTERNAL AFFAIRS DOESN'T INFORM –

[17] THE COURT: THIS ISN'T A CRIMINAL OFFENSE. THIS ISN'T SOMETHING LIKE YOU WOULD THINK IS CRIMINAL WRONGDOING; THERE'S NO NEED FOR SECRECY.

THAT IS PART OF WHAT DISTURBS THE COURT HERE IS THAT THESE OFFICERS DID HAVE THIS REASONABLE EXPECTATION OF PRIVACY; THERE WAS THIS STATED POLICY BY LIEUTENANT DUKE THAT, 'HEY, WE'RE NOT GOING TO LOOK AT YOUR PAGERS AS LONG AS YOU PAY.'

WELL, YOU CHANGED THAT POLICY DRAMATICALLY HERE.

IF YOU WOULD HAVE NOTIFIED THE OFFICERS, SAYING, 'LISTEN, LIEUTENANT DUKE DOESN'T WANT TO BE THE BILL COLLECTOR ANYMORE. WE NEED TO FIGURE OUT HOW MUCH OF THIS IS PRIVATE, HOW MUCH IS BUSINESS, AND LET'S SIT DOWN AND FIGURE THIS OUT.' AND PERHAPS YOU COULD HAVE TURNED TO THE OFFICERS AND SAID 'WE'RE GOING TO ASK ARCH WIRELESS TO PULL THESE TRANSCRIPTS. YOU MAY HAVE SOME PERSONAL INFORMATION ON THERE . . . '

AND THERE WAS SOME HIGHLY PERSONAL INFORMATION. I MEAN, DESCRIPTIONS OF SEXUAL CONDUCT; ALL KINDS OF DIFFERENT THINGS THAT WERE HIGHLY PERSONAL, VERY

PRIVATE, RELATED TO INTIMATE RELATIONSHIPS BETWEEN WIVES, GIRLFRIENDS, AND ALL OF THE ABOVE.

WHY WOULD YOU SECRETLY OBTAIN THAT INFORMATION WITHOUT PROVIDING ANY NOTICE TO THE PEOPLE WHO HAD THIS EXPECTATION OF PRIVACY; THAT WERE ASSURED THERE WAS NOT GOING TO BE AN AUDIT; THAT THERE'S NO CRIMINAL INVESTIGATION; THAT THERE'S NO EXIGENT CIRCUMSTANCES TO JUSTIFY THIS?

[18] MS. STEPHAN: I DON'T THINK THERE WAS AN INTENT TO BE SECRETIVE. AND I ALSO BELIEVE, RESPECTFULLY, THAT THE COURT'S OPINION THAT THEY HAD A REASONABLE EXPECTATION OF PRIVACY MAY BE IN ERROR.

THE FREEDOM OF INFORMATION ACT STILL ALLOWS ANY INDIVIDUAL IN THE CITY OF ONTARIO TO MAKE A REQUEST FOR THE TRANSCRIPTS OF THESE PAGERS, AND WE WOULD NOT BE PERMITTED TO DECLINE THAT REQUEST. THERE'S NOTHING IN THE CALIFORNIA PUBLIC RECORDS ACT WHICH PRECLUDES US FROM GIVING THEM THE TRANSCRIPTS. AND THE PURPOSE OF HAVING THAT AUDIT AVAILABLE IS BECAUSE, AS LIEUTENANT DEL TORRO INFORMED MR. QUON, IF HE IS OUT ON A S.W.A.T. CALL AND THERE'S A SHOOTING AND OFFICER QUON IS

INVOLVED IN THAT SHOOTING, THERE MAY BE THE PRESS ENTERPRISE ASKING FOR TWO DAYS BEFORE AND TWO DAYS AFTER, 'WHAT WAS GOING ON IN OFFICER QUON'S BRAIN?'

THE COURT: BESIDES YOUR ARGUMENT THAT THE COURT IS IN ERROR IN ITS PREVIOUS ORDER, DO YOU HAVE ANY OTHER ARGUMENT YOU WOULD LIKE TO PRESS AT THIS POINT AS TO WHY YOU DID NOT USE A LESS RESTRICTIVE OR LESS INTRUSIVE ALTERNATIVE TO SECURING THIS INFORMATION?

AND WE'VE NOW ESTABLISHED WHAT YOUR PURPOSE WAS IN DOING THIS, AND THE COURT WILL USE THAT AS THE BASIS FOR ITS FURTHER ANALYSIS.

BUT IS THERE ANY OTHER REASON THAT YOU DID NOT USE A LESS INTRUSIVE WAY, BESIDES YOUR CONTENTION THAT THERE WAS NO [19] REASONABLE EXPECTATION OF PRIVACY INTO THE CONTENTS OF THESE PAGERS, IN LIGHT OF WHAT LIEUTENANT DUKE HAD TOLD THESE INDIVIDUAL OFFICERS?

MS. STEPHAN: I BELIEVE WE DID USE THE LEAST INTRUSIVE. BECAUSE, AGAIN, THE NUMBER OF CHARACTERS HAD TO BE EVALUATED VERSUS FOR BUSINESS VERSUS PERSONAL TO ALLOW THE CITY TO KNOW IF THEY NEEDED TO INCREASE BECAUSE OF BUSINESS OR PERSONAL CHARACTERS.

THE COURT: THE PLAINTIFF HAS SUED NOT ONLY THE INDIVIDUAL OFFICERS BUT THE CITY OF ONTARIO.

MS. STEPHAN: CORRECT.

THE COURT: INDIVIDUAL OFFICERS CAN CLAIM QUALIFIED IMMUNITY, BUT MY UNDERSTANDING IS THAT THE SUPREME COURT HAS MADE IT QUITE CLEAR THAT CITIES CANNOT.

YOU PRESSED THE ARGUMENT THAT SOMEHOW THE CITY IS OFF BECAUSE THE OFFICES ARE OFF. I'M NOT FOLLOWING THE ANALYSIS THERE.

MS. STEPHAN: WE'RE SAYING THAT SINCE THERE IS NO CONSTITUTIONAL VIOLATION, THE CITY IS ESSENTIALLY IMMUNE.

THE COURT: SO WE GO BACK TO WHETHER THE COURT WAS ERRONEOUS IN ITS RULING.

THERE'S NOTHING ABOUT QUALIFIED COMMUNITY, THOUGH, THAT SOMEHOW EXEMPTS THE CITY.

MS. STEPHAN: ACTUALLY, I THINK THAT – WE HAVE NOT DISCUSSED WHETHER OR NOT THE SEARCH AND SEIZURE WAS REASONABLE. [20] AND OUR ARGUMENT IS

THAT, IN FACT, THE SEARCH WAS REASONABLE, AND THEREFORE THERE IS NO CONSTITUTIONAL VIOLATION AND THE CITY IS NOT LIABLE.

THE COURT: LET'S ADDRESS THAT ISSUE, BECAUSE THAT'S THE SECOND PRONG OF THE CONSTITUTIONALITY. THE COURT ONLY FOUND REASONABLE EXPECTATION OF PRIVACY, THE COURT HAD NOT YET FOUND WHETHER THE SCOPE WAS REASONABLE.

ONE OF THE REASONS WHY I'VE HESITATED IN MAKING A FINDING ON THE SCOPE WAS THAT THE PURPOSE OF THE SEARCH – WHICH, OF COURSE, GOVERNS THE SCOPE OR THE REASONABLENESS OF THE SCOPE – WAS NOT CLEAR TO THE COURT.

I RECEIVED FROM THE VARIOUS BRIEFS SEVERAL PURPOSES, BUT NOW WE KNOW THAT THE PURPOSE WAS SIMPLY TO DETERMINE WHETHER OR NOT BUSINESS OR PERSONAL MOTIVATIONS ACCOUNTED FOR THE OVERAGES IN THE USE OF THE PAGERS.

WHAT'S YOUR ARGUMENT AS TO WHY THE SCOPE HERE WAS REASONABLE?

MS. STEPHAN: IT WAS THE LEAST INTRUSIVE MANNER TO DETERMINE WHETHER OR NOT THE OFFICERS WERE APPROACHING OR HAD PASSED 25,000 CHARACTERS FOR BUSINESS REASONS EXCLUSIVELY, VERSUS

ADDITIONAL PERSONAL TIME. THEREFORE, IT'S JUST THE EASIEST AND MOST LEAST INTRUSIVE TO HAVE TWO INTERNAL AFFAIRS OFFICERS GO THROUGH. AND BEING INTERNAL AFFAIRS, THEY ARE SEPARATE, ESSENTIALLY, FROM THE REST OF THE DEPARTMENT.

THE COURT: WHAT ABOUT THE COURT'S SUGGESTION THAT [21] YOU SIMPLY GIVE THE OFFICERS IN QUESTION AN OPPORTUNITY TO REDACT THE MORE PERSONAL, SALACIOUS DETAILS IN THE COMMUNICATIONS?

MS. STEPHAN: THAT'S AN OPTION THAT WOULD BE TIME AWAY FROM THE STREETS, PROTECTING THE STREETS, VERSUS HAVING TWO INTERNAL AFFAIRS OFFICERS WHO ARE BEHIND DESKS.

THE COURT: ANY OTHER ARGUMENT, COUNSEL?

MS. STEPHAN: NOT THAT I CAN THINK OF OFF THE TOP OF MY HEAD.

THE COURT: ARE YOU ALSO CONCEDING THAT IF THE CONSTITUTIONALITY – IF THE COURT DOES FIND THAT THE AUDIT WAS UNCONSTITUTIONAL, IF THE COURT WERE TO FIND THAT NOT ONLY WAS THERE A REASONABLE EXPECTATION OF PRIVACY THAT THE SCOPE WAS UNREASONABLE, YOU WOULD

CONCEDE THEN THAT QUALIFIED IMMUNITY DOES NOT EXTEND TO THE CITY?

MS. STEPHAN: THAT IS MY UNDERSTANDING.

THE COURT: OKAY.

THOSE ARE MY QUESTIONS, COUNSEL. I'LL GIVE BOTH OF YOU AN OPPORTUNITY TO MAKE ANY FURTHER COMMENTS, IF YOU WANT TO.

MS. STEPHAN: JUST WITH RESPECT TO WHETHER OR NOT THIS VIOLATION WHERE THE LAW WAS CLEARLY ESTABLISHED.

AGAIN, IN THE SORRELS CASE, THE EXACT VIOLATION IN THAT CASE WAS UP ON APPEAL AT THE TIME, AND THE COURT OF APPEALS WAS ATTEMPTING TO DETERMINE WHETHER OR NOT IT WAS A [22] VIOLATION OR WHETHER OR NOT THE LAW WAS CLEARLY ESTABLISHED. THE COURT DETERMINED THAT THE LAW WAS IN VIOLATION OF THE CONSTITUTION, BUT IN THE SORRELS CASE, WHICH WAS PENDING AT THE TIME, BECAUSE THE COURT OF APPEALS HAD NOT MADE A DETERMINATION AT THE TIME SORRELS WAS BEFORE THE COURT, THE COURT HELD IT WAS NOT CLEARLY ESTABLISHED.

HERE WE HAVE BOHACH OUT THERE, WE HAD THE FREEDOM OF INFORMATION ACT OUT THERE, WHERE CHIEF SCHARF COULD

REASONABLY RELY UPON THAT CASE AND THAT STATUTE TO DETERMINE THAT IT WOULD BE REASONABLE FOR HIM TO AUDIT THE PAGERS, AND THEREFORE THE LAW IS NOT CLEAR AS TO WHETHER IT'S AN UNREASONABLE SEARCH AND SEIZURE.

THE COURT: BUT IN BOHACH YOU HAVE A SPECIFIC EXPLICIT WRITTEN DEPARTMENT POLICY THAT WE CAN AUDIT THE PAGERS.

YOU DON'T HAVE THAT IN THIS CASE. IN FACT, YOU HAVE A STATEMENT BY THE LIEUTENANT THAT WE WILL NOT AUDIT THE PAGERS AS LONG AS YOU PAY FOR THE OVERAGES.

MS. STEPHAN: THAT HE WOULD NOT AUDIT THE PAGERS.

THE COURT: IS THERE SOMEBODY ELSE WHO WOULD AUDIT THEM?

MS. STEPHAN: CHIEF SCHARF IS THE ONE WHO ORDERED THE AUDIT.

THE COURT: I UNDERSTAND THAT.

MY UNDERSTANDING, BASED ON THE EVIDENCE IN THIS CASE, [23] IS THAT IT WAS LIEUTENANT DUKE'S RESPONSIBILITY TO OVERSEE THE PAGERS.

MS. STEPHAN: HE IS THE ONE WHO TOLD THE SECRETARY TO ORDER THEM;

THE TRANSCRIPTS WERE THEN GIVEN TO SERGEANT QUON'S SUPERVISOR, LIEUTENANT DEL TORRO.

THE COURT: THAT'S NOT MY QUESTION.

I UNDERSTAND THAT THE CHIEF HAD DELEGATED TO LIEUTENANT DUKE THE RESPONSIBILITY FOR OVERSEEING AND AUDITING THE PAGERS, MAKING SURE THEY WERE PAID FOR AND BEING USED CONSISTENTLY WITH DEPARTMENT POLICY, ETC.

MS. STEPHAN: I DON'T KNOW THAT FOR A FACT. ALL I KNOW IS THAT CHIEF SCHARF INSTRUCTED LIEUTENANT DUKE TO INFORM HIS SECRETARY TO GET THE TRANSCRIPTS.

I DON'T BELIEVE THAT LIEUTENANT DUKE WAS GOING TO DO THE AUDIT. I THINK THAT WENT DIRECTLY –

THE COURT: THAT'S NOT WHAT I'M SAYING.

LIEUTENANT DUKE SPOKE, CERTAINLY FOR THE DEPARTMENT, WHEN HE TOLD THE OFFICERS THAT THE PAGERS WOULD NOT BE AUDITED UNLESS THEY CONTESTED THE PAYING OF THE OVERAGES; CORRECT?

MS. STEPHAN: CORRECT.

THE COURT: AND HE SPOKE FOR THE DEPARTMENT.

MS. STEPHAN: I DON'T THINK THAT –

THE COURT: IT WOULD BE REASONABLE FOR ANY STREET OFFICER TO RELY ON A LIEUTENANT'S STATEMENT THAT THAT IS THE POSITION OF THE DEPARTMENT.

[24] MS. STEPHAN: TRUE.

THE COURT: I UNDERSTAND THERE'S ALL KINDS OF BAD BLOOD BETWEEN THE CHIEF AND LIEUTENANT DUKE.

MS. STEPHAN: THERE'S NO BAD BLOOD; THEY ARE GOOD FRIENDS.

THE COURT: MAYBE I HAVE IT WRONG.

THERE'S A LOT OF BAD BLOOD BETWEEN A NUMBER OF OFFICERS ON THE ONTARIO POLICE DEPARTMENT; I'VE SEEN THAT PLAYED OUT HERE IN COURT.

MS. STEPHAN: YES. NOT WITH CHIEF SCHARF; HE'S PART OF THE RETIRED GROUP.

THE COURT: VERY WELL.

ANYTHING FURTHER?

MS. STEPHAN: NOT AT THIS TIME.

THE COURT: FROM THE PLAINTIFF?

WOULD YOU LIKE TO ADDRESS ANY OF THESE POINTS?

MR. MORGUESS: AS FAR AS THE EXPLANATION FOR CONDUCTING THE SEARCH, I GUESS YOU JUST HAVE TO TAKE WHAT COUNSEL TS SAYING AT FACE VALUE AND LOOK AT ALL OF THE EVIDENCE THAT'S IN THE RECORD. BUT IT WASN'T THE ENTIRE DEPARTMENT THAT WAS GOING OVER THE LIMIT; IT WAS TWO GUYS; AND THEY WANTED TO LOOK AT THESE TWO GUYS, AND THAT WAS IT.

THE COURT: AS I UNDERSTAND IT, THEY WERE THE ONLY TWO THAT WENT OVER THAT MONTH. IS THAT YOUR UNDERSTANDING?

MR. MORGUESS: I KNOW THEY WERE THE ONLY TWO THAT [25] WENT OVER THAT MONTH. BUT AS FAR AS THE PAST, BEFORE IT WAS 10,000 CHARACTERS AND THEN THEY INCREASED IT TO 25 – AND I THINK – ALTHOUGH I DON'T HAVE THE RECORD IN FRONT OF ME – IT WAS BECAUSE ALMOST EVERYBODY WAS GOING OVER THE 10,000; SO IT WAS A NO-BRAINER, LETS INCREASE IT.

THE COURT: YOU'RE SUGGESTING THAT IF THE REAL PURPOSE OF THIS WHOLE INVESTIGATION WAS TO DETERMINE DEPARTMENT-WIDE THE USAGE OR THE PERSONAL USAGE, THAT YOU WOULDN'T JUST

LOOK AT TWO INDIVIDUALS BUT YOU'D LOOK AT, SAY, A 6-MONTH PERIOD AND DETERMINE A BROAD SCOPE?

MR. MORGUESS: I DON'T KNOW HOW LEGITIMATE THE EXPLANATION IS. I'M JUST QUESTIONING IT.

IT WENT TO INTERNAL AFFAIRS FOR THEM TO LOOK AT IT, WHICH IS ODD IF IT WAS STRICTLY AN ADMINISTRATIVE, YOU KNOW, 'ARE WE SPENDING OUR MONEY WISELY HERE, OR ARE WE DOING THE BEST WE CAN FOR CUR OFFICERS?'

AND I REMEMBER SEEING UNDER THE STORED COMMUNICATIONS ACT THERE WAS ALSO A WAY TO JUST REQUEST RECORDS THAT HAD NUMBERS INSTEAD OF ACTUAL CONTENTS OF TRANSCRIPTS; AND I THINK THAT WAS UNDER 18 USC SECTION 2703.

THE COURT: HOW WOULD YOU DETERMINE WHETHER THE CONTENT WAS PERSONAL OR BUSINESS IF YOU JUST GOT THE NUMBERS?

MR. MORGUESS: PROBABLY FROM THE NUMBER.

IF THE NUMBER IS YOUR WIFE FROM WHOM YOU'RE SEPARATED . . .

[26] THE COURT: OH, THE PHONE NUMBER, YOU'RE SAYING?

MR. MORGUESS: RIGHT. THEN IT'S PROBABLY PERSONAL; SO THAT WOULD HAVE BEEN A MUCH LESS RESTRICTIVE WAY.

THE COURT: AS I UNDERSTAND IT, ONE OF THE GIRLFRIENDS INVOLVED IN THIS TRIANGLE WAS ACTUALLY A POLICE OFFICER.

MR. MORGUESS: NO, SHE WAS NOT A POLICE OFFICER. SHE WAS A DISPATCHER, AND HER PAGER WAS HER OWN PERSONAL PAGER.

BUT THEN AGAIN, YOU STILL COULD HAVE GOTTEN THE NUMBERS AND THEN SAID 'WHAT'S WITH THIS ONE? WHAT'S WITH THAT ONE?' THEY SEEMED TO TRUST THE OFFICERS UP UNTIL THEN.

OTHER THAN THAT I HAVE NOTHING TO ADD UNLESS THERE'S QUESTIONS.

THE COURT: NO. THAT WAS ALL.

ANYTHING FURTHER FROM THE DEFENSE?

MR. MARTIN: DO YOU WISH TO BE HEARD FROM ARCH WIRELESS?

THE COURT: YES. YOU MAY.

MR. MARTIN: TOM MARTIN FROM ARCH WIRELESS.

YOUR HONOR, I'D JUST SUBMIT TO THE COURT THAT THE COURT'S COMMENTS REGARDING CONGRESS'S INTENT TO OCCUPY

THE FIELD SEEMS PRETTY MANIFEST AND EXPLICIT IN THE LANGUAGE OF THE STATUTE.

THE COURT, IN ITS DECISION IN THE MOTION FOR SUMMARY JUDGEMENT, HAS ALREADY DETERMINED THAT ARCH WIRELESS WAS A [27] REMOTE COMPUTING SERVICE, AND THEREFORE IMMUNIZED FROM PROSECUTION UNDER THE ACT.

I WOULD JUST SUBMIT, YOUR HONOR, THAT THE COURT'S ANALYSIS WITH RESPECT TO THE FOURTH AMENDMENT CLAIMS THAT WERE BEING ASSERTED BY PLAINTIFFS, FIRST OF ALL, BECAUSE ARCH WIRELESS IS A PRIVATE ENTITY, I WOULD SUBMIT THAT THE FOURTH AMENDMENT ANALYSIS REALLY DOESN'T APPLY TO ARCH WIRELESS.

BUT IN SO MUCH AS THERE'S AN OVERLAP OF THE ANALYSIS WITH REGARD TO A REASONABLE EXPECTATION OF PRIVACY, IF YOUR HONOR WERE TO FIND THAT ARCH WIRELESS HAD ANYTHING TO DO WITH FOSTERING A REASONABLE EXPECTATION OF PRIVACY, IT WOULD OPEN UP A WHOLE CAN OF WORMS THAT CLEARLY WASN'T ENVISIONED BY CONGRESS.

ESSENTIALLY, THE ANALYSIS AS IT APPLIES TO THE CITY WITH RESPECT TO A VIOLATION OF PRIVACY RIGHTS IS DIFFERENT THAN THE ANALYSIS IT APPLIES TO ARCH WIRELESS.

FIRST OF ALL, WITH RESPECT TO ARCH WIRELESS, I DON'T THINK PLAINTIFFS CAN ARGUE THAT THERE'S A LEGALLY PROTECTED INTEREST BASED ON THE LANGUAGE OF THE STATUTE IN THAT THE STATUTE CLEARLY STATES THAT IF THE SUBSCRIBER REQUESTS TRANSCRIPTS FROM A SERVICE PROVIDER SUCH AS ARCH WIRELESS, THAT'S FREE FROM PROSECUTION. THEREFORE, PLAINTIFFS WOULDN'T HAVE A LEGALLY PROTECTED INTEREST. AND THAT'S ONE AREA.

SECOND, AS FAR AS THE REASONABLE EXPECTATION OF PRIVACY, WHETHER THE CITY IMPLEMENTED SOME KIND OF CHANGE IN [28] ITS POLICY WITH RESPECT TO THE AUDITING OF PAGERS IS REALLY IMMATERIAL AND IRRELEVANT TO ARCH.

THE COURT: CORRECT ME IF I'M WRONG, BUT THERE'S NO EVIDENCE THAT ARCH WIRELESS KNEW OF WHAT LIEUTENANT DUKE HAD SAID TO THE OFFICERS. IS THAT CORRECT?

MR. MORGUESS: THE EVIDENCE IS THAT ARCH WOULD PURPOSELY REMAIN IGNORANT AS TO ANY TYPE OF POLICY; IT WOULDN'T INQUIRE; IT WAS NOT INTERESTED.

THE COURT: BUT AGAIN, THERE'S NO EVIDENCE THAT THEY HAD ANY KNOWLEDGE OF THE MODIFICATION OF THE WRITTEN

TERMS OF THE AGREEMENT WHICH ALLOWED THESE AUDITS TO TAKE PLACE.

MR. MORGUESS: NO, YOUR HONOR.

THE COURT: ALL RIGHT.

MR. MARTIN: THAT'S CORRECT, YOUR HONOR.

AND MOREOVER, I WOULD SUBMIT THAT THE STATUTE DOESN'T IMPOSE THAT DUTY ON ARCH WIRELESS. ARCH'S DUTIES UNDER THE STATUTE ARE TO VERIFY THAT THE REQUEST IS COMING FROM A SUBSCRIBER, WHICH THEY DID, AND ALSO TO VERIFY THAT THE REQUEST IS COMING FROM A DULY AUTHORIZED PERSONNEL WITHIN THE SUBSCRIBER, WHICH THEY DID. ONCE THEY HAD DONE THAT, THEY MET THE DUTIES THAT ARE IMPOSED BY THE STATUTORY FRAMEWORK.

TO SUGGEST OTHERWISE, YOUR HONOR WOULD OPEN UP THIS PANDORA'S BOX WHERE WIRELESS OPERATORS WOULD BE FORCED TO CONDUCT SOME KIND OF OVERSIGHT INTO THE WORKPLACE TO DETERMINE THE POLICIES THAT ARE IN PLACE IN A PARTICULAR WORK ENVIRONMENT [29] TO DETERMINE IF THE STATED POLICIES THAT ARE COMMUNICATED TO THEM BY WHOEVER THEY DID CONTACT AS A SUBSCRIBER, IF THAT'S CORRECT OR NOT. IT WOULD ESSENTIALLY IMPOSE A BURDEN UPON WIRELESS OPERATORS TO

CONDUCT DISCOVERY WITH RESPECT TO A CITY'S REASONABLE EXPECTATION OF PRIVACY OR ANYTHING THAT IT'S DONE.

THE COURT HAS ALREADY DETERMINED ON PAGE 31 OF ITS DECISION IN MOTION FOR SUMMARY JUDGMENT THAT THE EXPECTATION OF PRIVACY IS, IN FACT, DETERMINED BY THE OPERATIONAL REALITY OF THE WORKPLACE.

SO I WOULD SUBMIT THAT CONGRESS HAD NO INTENTION FOR ARCH WIRELESS TO BE PUT IN THE POSITION WHERE IT HAS TO OVERSEE SUCH A PROCESS.

THE COURT: I DID FIND THAT THE OPERATIONAL REALITIES OF THE WORKPLACE GOVERN. I DID NOT ADDRESS THE ISSUE OF YOUR OBLIGATION OR ARCH WIRELESS'S OBLIGATION TO ASCERTAIN THOSE OPERATIONAL REALITIES. BUT I UNDERSTAND WHAT YOU'RE ARGUING.

MR. MARTIN: ANYTHING FURTHER?

THE COURT: NOT FROM THE COURT.

YOU MAY WANT TO ADDRESS THAT LAST POINT.

MR. MORGUESS: JUST AS COUNSEL WAS SPEAKING, I WAS JUST THINKING OF SOMETHING, SO I'M KIND OF THINKING OUT LOUD.

THE COURT: ITS GOOD TO CONTINUE THINKING THROUGHOUT THE PROCESS.

MR. MORGUESS: EVEN IF IT HURTS.

[30] 2708, WHICH YOUR HONOR BROUGHT UP AS FAR AS – I DON'T REMEMBER THE EXACT QUOTED LANGUAGE, BUT I REMEMBER THE CONCEPTS.

I JUST WONDER, WHEN WOULD THAT EXCEPTION APPLY UNDER 2708, IF NOT IN THIS CASE? I DON'T NECESSARILY HAVE AN ANSWER, BUT IT DOESN'T SEEM THAT 2708 SAYS THE VIOLATION OF THIS –

THE COURT: IT SAYS ' . . . SANCTIONS DESCRIBED IN THIS CHAPTER ARE THE ONLY JUDICIAL REMEDIES AND SANCTIONS FOR NONCONSTITUTIONAL VIOLATIONS OF THIS CHAPTER.'

SO THAT SEEMS TO BE TALKING ABOUT NONCONSTITUTIONAL VIOLATIONS. CERTAINLY CONSTITUTIONAL VIOLATIONS ARE EXCEPTED. BUT ALL NONCONSTITUTIONAL VIOLATIONS – AND THE COURT IS READING FROM THE FEDERAL PERSPECTIVE – SO A STATE CONSTITUTIONAL VIOLATION IS A NONCONSTITUTIONAL VIOLATION. THAT'S MY GENERAL READING OF IT.

MR. MORGUESS: I JUST IMAGINE, THOUGH, BECAUSE THE SENSE I'M GETTING

FROM THE COURT IS THAT THAT WOULD ABSOLVE ANY PROVIDER OF ANY LIABILITY.

THE COURT: AS LONG AS THEY ARE OPERATING –

I'M UNCOMFORTABLE WITH THE NOTION OF MAKING EVERY PROVIDER ESSENTIALLY INVESTIGATE THE OPERATIONAL REALITIES OF EVERY WORKPLACE. I'M SYMPATHETIC TO THE PLAINTIFF'S ARGUMENT, AND I'VE ALREADY RULED IN FAVOR OF THE FACT THAT THE CITY CANNOT SIMPLY RELY ON THEIR STATED CONTRACT BETWEEN THEM AND THE WIRELESS PROVIDER.

[31] MR. MORGUESS: AND WE APPRECIATE THAT.

THE COURT: AND WHEN THEY MODIFY THAT THROUGH SOMEONE WHO SPEAKS FOR THE CITY, LIKE LIEUTENANT DUKE, THEY HAVE TO LIVE WITH THAT MODIFICATION.

BUT FOR ME TO GO ONE STEP FURTHER, FOR THIS COURT TO GO ONE STEP FURTHER, AND HOLD THAT THE WIRELESS PROVIDER HAS THE DUTY TO BE AWARE OF THOSE TYPES OF INFORMAL, OFF-THE-CUFF MODIFICATIONS, THAT DOES SEEM TO BE AN ONEROUS BURDEN TO BE PLACING ON ARCH WIRELESS OR ANY OTHER PROVIDER.

MR. MORGUESS: I UNDERSTAND THE COURT'S CONCERNS.

THE COURT: ALL RIGHT.

MR. MORGUESS: I JUST AM THINKING OUT LOUD.

THAT OBVIOUSLY DOES NOT CREATE IMMUNITY TO LIABILITY UNDER ALL CIRCUMSTANCES, BECAUSE IT DOES SAY FOR VIOLATIONS, NONCONSTITUTIONAL VIOLATIONS OF THIS CHAPTER.

THE COURT: IT DOESN'T.

CONSTITUTIONAL VIOLATIONS, CERTAINLY YOU ALWAYS HAVE THAT UNDER THIS ACT.

MR. MORGUESS: I UNDERSTAND.

THE COURT: IF YOU CAN'T SET OUT THE CONSTITUTIONAL VIOLATION, THEN, YES, IF THE COURT ADOPTS THIS REASONING, WHICH IT TENTATIVELY IS EMBRACING, THAT WOULD FORECLOSE ANY STATE LAW STATE BASED CLAIMS.

MR. MORGUESS: AND THAT'S WHAT I THINK THE STATUTE DOES NOT INTEND.

[32] THE COURT: WELL, THE STATUTE'S INTENT IS SOMETHING THAT I'VE LABORED UNDER FOR SOME TIME NOW. IT'S NOT AS CLEAR AS I'D LIKE IT TO BE.

IF THERE'S NOTHING FURTHER, THE COURT WILL TAKE IT UNDER SUBMISSION. I'LL ISSUE A WRITTEN OPINION SOON.

GOOD MORNING.

(COURT IS IN RECESS.)

[Certificate Omitted In Printing]

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JEFF QUON, JERILYN QUON, APRIL FLORIO, DOREEN KLEIN, STEVE TRUJILLO, et al. Plaintiffs vs. ARCH WIRELESS, INC., CITY OF ONTARIO, LLOYD SCHARF, DEBBIE GLENN, et al. Defendants.	Case No.ED CV 03-199 SGL (Opx) District Judge: Honorable Stephen G. Larson AFFIDAVIT OF PATRICK McMAHON

I, Patrick McMahon, declare as follows:

1. I am a Sergeant with the City of Ontario Police Department, assigned to Internal Investigations. If called as a witness, I could and would

competently testify to the facts contained within this affidavit.

2. When performing an investigation into a police officer's conduct, I do not rely solely on the information that officer provides. If there is documentary evidence to support the officer, then that information is used in the investigation.

3. In late October 2002, I was assigned to perform the internal affairs investigation into Jeff Quon's use of the city-owned text message pager. While information provided to me by Sgt. Quon was relevant to my investigation, the documentation, i.e., the transcripts from the text message pager assigned to him was relevant and necessary. I could not determine what portion of the transmissions were created while Sgt. Quon was on duty, versus what portion were created while off-duty without looking at the transmissions.

4. I, assisted by Sgt. Debbie Glenn, redacted the transmissions Sgt. Quon created while off-duty. This allowed us to determine the amount of time he used the city-owned pager while on duty. Sgt. Quon was asked and indicated that he could not state how much time he spent on the pager during work hours. Therefore, reviewing and redacting the transcripts was the only reasonable method to obtain this information.

5. To determine what portion of Sgt. Quon's transmissions were on duty, I requested his time sheet for the month of August 2002. Using his time

sheet, I matched the date and time Sgt. Quon received and transmitted a text message during his normally scheduled workday. I crossed out the transmissions that did not occur on-duty then totaled the transmissions he had received and sent for each workday. Sgt. Quon had a total of 456 personal transmissions during his normally scheduled workdays for the month of August. The most was 80 on August 14, and the least was 6 on August 29.

6. The vast majority of the text messages were personal. There were very few business text messages.

I declare under penalty of perjury, pursuant to the laws of the state of California, that the foregoing is true and correct.

This declaration is signed this 30th day of June, 2006 in Tustin, California.

/s/ Patrick McMahon
PATRICK McMAHON,
Declarant

PETITIONER'S BRIEF

No. 08-1332

In The
Supreme Court of the United States

CITY OF ONTARIO, CALIFORNIA,
ONTARIO POLICE DEPARTMENT,
and LLOYD SCHARF,

Petitioners,

v.

JEFF QUON, JERILYN QUON,
APRIL FLORIO, and STEVE TRUJILLO,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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BOTH SIDES

QUESTIONS PRESENTED

While individuals do not lose Fourth Amendment rights merely because they work for the government, some expectations of privacy held by government employees may be unreasonable due to the "operational realities of the workplace." *O'Connor v. Ortega*, 480 U.S. 709, 717 (1987) (plurality opinion). Even if there exists a reasonable expectation of privacy, a warrantless search by a government employer—for non-investigatory work-related purposes or for investigations of work-related misconduct—is permissible if reasonable under the circumstances. *Id.* at 725-726 (plurality opinion). The questions presented are:

1. Whether a SWAT team member has a reasonable expectation of privacy in text messages transmitted on his SWAT pager, where the police department has an official no-privacy policy but a non-policymaking lieutenant announced an informal policy of allowing some personal use of the pagers.

2. Whether the Ninth Circuit contravened this Court's Fourth Amendment precedents and created a circuit conflict by analyzing whether the police department could have used "less intrusive methods" of reviewing text messages transmitted by a SWAT team member on his SWAT pager.

3. Whether individuals who send text messages to a SWAT team member's SWAT pager have a reasonable expectation that their messages will be free from review by the recipient's government employer.

PARTIES TO THE PROCEEDING

Petitioners (defendants and appellees below): City of Ontario, California; Ontario Police Department; Lloyd Scharf.

Respondents (plaintiffs and appellants below): Jeff Quon; Jerilyn Quon; April Florio; Steve Trujillo.

Additional defendants and appellees below: Debbie Glenn; Arch Wireless Operating Company, Inc.

Additional plaintiff below (not a party to the appellate proceedings): Doreen Klein.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 529 F.3d 892 (9th Cir. 2008). Appendix to the Petition for a Writ of Certiorari ("App.") at 1-40. The Ninth Circuit's order denying rehearing and rehearing en banc, including a one-judge concurring opinion and a seven-judge dissenting opinion, is reported at 554 F.3d 769 (9th Cir. 2009). App. 124-150. The opinion of the United States District Court for the Central District of California is reported at 445 F. Supp. 2d 1116 (C.D. Cal. 2006). App. 41-116.

JURISDICTION

The Ninth Circuit issued its decision on June 18, 2008. App. 1. Petitioners City of Ontario, California, and Ontario Police Department timely filed a petition for rehearing and rehearing en banc, which was denied on January 27, 2009, with one judge concurring in and seven judges dissenting from the denial of rehearing en banc. App. 124-125, 136. Petitioners timely filed a petition for a writ of certiorari on April 27, 2009. This Court granted the petition on December 14, 2009, and has jurisdiction under 28 U.S.C. section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. U.S. Const. amend. IV.

Section 1983 of Title 42 of the United States Code provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the

District of Columbia shall be considered to be a statute of the District of Columbia. 42 U.S.C. § 1983.

STATEMENT OF THE CASE

Ontario Police Department SWAT Sergeant Jeff Quon used his Department-issued text-messaging pager to exchange hundreds of personal messages—many sexually explicit—with, among others, his wife (Jerilyn Quon), his girlfriend (April Florio), and a fellow SWAT sergeant (Steve Trujillo), while he was on duty. He did so notwithstanding an explicit City policy warning employees not to expect any privacy in electronic communications on City equipment. After the Department later reviewed transcripts of the text messages, Sergeant Quon and his text-messaging partners sued the police chief and the City, alleging a Fourth Amendment violation.

A. The Ontario Police Department's Official No-Privacy Policy And Its Review Of Transcripts Of Text Messages On Sergeant Quon's Department-Issued Pager.

Since at least December 1999, the City of Ontario had a written "Computer Usage, Internet and E-mail Policy," which permitted employees only limited personal use of "City-owned computers and all associated equipment," including e-mail systems, and warned employees not to expect privacy in such use. App.

151-152. The City's written policy advised employees, among other things, that:

> • "The use of these tools for personal benefit is a significant violation of City of Ontario Policy." App. 152, ¶ II.
>
> • "The use of any City-owned computer equipment, . . . e-mail services or other City computer related services for personal benefit or entertainment is prohibited, with the exception of 'light personal communications' . . . ." *Id.*, ¶ III.A.

The policy explained that "[s]ome incidental and occasional personal use of the e-mail system is permitted if limited to 'light' personal communications[,]" which "may consist of personal greetings or personal meeting arrangements." App. 153, ¶ III.F.

As for privacy and confidentiality, the policy informed employees they should expect none:

> • "The City of Ontario reserves the right to monitor and log all network activity including e-mail and Internet use, with or without notice. Users should have no expectation of privacy or confidentiality when using these resources." App. 152, ¶ III.C.
>
> • "Access to the Internet and the e-mail system is not confidential; and information produced either in hard copy or in electronic form is considered City property. As such, these systems should not be used for personal or confidential communications. Deletion of e-mail or other electronic information

> may not fully delete the information from the system." App. 153, ¶ III.D.
>
> • "[E-mail] messages are also subject to 'access and disclosure' in the legal system and the media." *Id.*, ¶ III.F.

The policy additionally stated that "[t]he use of inappropriate, derogatory, obscene, suggestive, defamatory, or harassing language in the e-mail system will not be tolerated." *Id.*, ¶ III.E.

Plaintiffs Jeff Quon and Steve Trujillo were sergeants with the Department and members of its SWAT team. Supplemental Excerpts of Record ("S.E.R.") 395, 397. In early 2000, each signed an employee acknowledgment of the policy, which reiterated that the City reserved the right to monitor e-mail usage and that employees "should have no expectation of privacy or confidentiality when using these resources." App. 156-157.

In October 2001, the City obtained alphanumeric (i.e., text-messaging) pagers from defendant Arch Wireless Operating Company, Inc., and contracted with Arch Wireless for the City's wireless communications needs. S.E.R. 415-416. The Department issued pagers to SWAT team members, including Sergeants Quon and Trujillo; as the district court stated, the purpose was to "enable better coordination and a more rapid and effective response to emergencies[.]" App. 45-46; *see also* S.E.R. 423-424, 428.

At a supervisory staff meeting in April 2002, which Sergeant Quon attended, Lieutenant Steve

Duke of the Department's Administration Bureau reminded all present that the pager messages "were considered e-mail" messages, meaning that "messages would fall under the City's policy as public information and eligible for auditing." Joint Appendix ("J.A.") 30, 42, 61. Chief Scharf attended that meeting and issued a memorandum to all supervisory staff, including Sergeant Quon, memorializing Lieutenant Duke's reminder. J.A. 28-30.

Under the City's contract with Arch Wireless, each pager had a monthly character limit of 25,000, above which the City had to pay extra. S.E.R. 471-472. When the pagers were first issued, the character allotment had been 10,000 per month, but the City had increased it to 25,000 after receiving the first bill. *Id.*

Lieutenant Duke—whose Administration Bureau handled "fiscal responsibility" for the Department, including "grants, purchasing and receiving, [and] budget" (J.A. 64-65)—was in charge of the Arch Wireless contract. J.A. 66. When Sergeant Quon exceeded the character limit within the first or second billing cycle after the pagers were distributed, Lieutenant Duke relayed to him what the district court called his "unwritten policy regarding the conditions under which an audit of a pager would take place for overages[.]" App. 50; *see also* J.A. 40.

Lieutenant Duke told Sergeant Quon that his messages "were considered e-mail and could be audited" (S.E.R. 174; *see also* J.A. 82), but also stated

"that it was not his intent . . . to audit employees' text messages to see if the overage is due to work-related transmissions." S.E.R. 174; *see also* J.A. 83. He advised Sergeant Quon that he "could reimburse the City for the overage" (J.A. 83); otherwise, Lieutenant Duke would "have to audit the transmission and see how many messages were non-work related." J.A. 40; *see also* J.A. 83. Lieutenant Duke also told Sergeant Quon that the messages were "public records and could be audited at any time." J.A. 40; *see also* J.A. 85. Sergeant Quon went over the monthly character limit three or four times and paid the City for the overages. J.A. 50-51.

In August 2002, two officers, one of whom was Sergeant Quon, exceeded the 25,000 character limit. *See* J.A. 61. In response to Lieutenant Duke's complaint that he was "tired of being a bill collector with guys going over the allotted amount of characters on their text pagers[,]" Chief Scharf asked Lieutenant Duke to order the transcripts for those two pagers for review. *See* S.E.R. 261; J.A. 61. Chief Scharf ordered the review, as a jury would later find, to "determine the efficacy of the existing character limits to ensure that officers were not being required to pay for work-related expenses." App. 119. The Department, as customer on the account with Arch Wireless, then requested and obtained from Arch Wireless the pager transcripts for the two officers. J.A. 61-62; S.E.R. 477, 480-481.

The Department's review "showed Sergeant Quon had exceeded his monthly allotted characters by

15,158 characters." J.A. 34. After initial Department review, the matter was referred to internal affairs to determine whether Sergeant Quon was wasting time attending to personal issues while on duty. App. 9. Sergeant Patrick McMahon, of internal affairs, with the help of Sergeant Debbie Glenn, redacted the transcripts to eliminate messages that did not occur on duty. App. 9, 56; *see also* J.A. 37.

The redacted pager transcripts revealed that Sergeant Quon—who said the SWAT team members "were given the pager and allowed to use it in any fashion we wanted to" (S.E.R. 423)—engaged in extensive personal text messaging while on-duty:

> • He had "a total of 456 personal transmissions during his normally scheduled workdays for the month of August [2002]. The most was 80 on August 14, and the least was 6 on August 29." J.A. 143.
>
> • "On average, Sergeant Quon would send and receive 28 transmissions during his normally scheduled shift[,]" of which only "3 would be business related and the rest would be non-work related." J.A. 43.

Some of the messages "were directed to or from his wife, [plaintiff] Jerilyn Quon," who was a former Department employee, "while others were directed to and from his mistress, [plaintiff April] Florio," who was a Department employee. App. 54-55; *see also* Excerpts of Record ("E.R.") 4, 38, 741-742; S.E.R. 303, 307, 424. Many were not "light personal communications," as defined in the policy, but rather were, in the

district court's words, "to say the least, sexually explicit in nature." App. 54; *see also* S.E.R. 532, 539, 546, 551-553 (redacted transcripts of selected text messages).

Sergeant McMahon reported to Chief Scharf that Sergeant Quon had violated Department policy by "not us[ing] proper care with Department equipment[,]" and by using the pager for "personal benefit or entertainment[.]" J.A. 43-44.

B. Plaintiffs' Suit In The District Court.

Sergeant Quon and his text-messaging partners sued the Chief of Police, the City, the Department ("Ontario defendants"), and others, under 42 U.S.C. section 1983, alleging Fourth Amendment violations. *See* App. 58.[1] On cross-motions for summary judgment, the district court first held that Sergeant Quon had a reasonable expectation of privacy in his pager transcripts as a matter of law under the "operational realities of the workplace" standard from *O'Connor v.*

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[1] Plaintiffs made other claims and sued other defendants, including police sergeant Debbie Glenn and Arch Wireless, asserting, among other things, claims under the Stored Communications Act ("SCA"), 18 U.S.C. sections 2701-2712, and the California Constitution. *See* App. 58. Ontario defendants do not address those claims here. Ontario defendants prevailed in the district court on the SCA claims against them, and plaintiffs thereafter abandoned those claims on appeal. App. 11 n.3. The Ninth Circuit's resolution of plaintiffs' privacy claims under the California Constitution hinged entirely on the Fourth Amendment claims. *See* App. 21, 39.

Ortega, 480 U.S. 709, 717 (1987) (plurality opinion). App. 88-97. The court based its decision on Lieutenant Duke's informal arrangement whereby "he would *not* audit [officers'] pagers so long as they agreed to pay for any overages." App. 90 (emphasis in original).

The court next considered whether the review of the transcripts was reasonable under the circumstances. App. 97. It determined there was a genuine issue of material fact as to "the actual *purpose* or *objective* Chief Scharf sought to achieve[.]" *Id.* (emphasis in original). The court reasoned—again based on Lieutenant Duke's accommodation—that the transcript review was *not* reasonable if it "was meant to ferret out misconduct by determining whether the officers were 'playing games' with their pagers or otherwise 'wasting a lot of City time conversing with someone about non-related work issues[.]' " App. 98. But the court reasoned the transcript review *was* reasonable at the inception if the purpose was to "determin[e] the utility or efficacy of the existing monthly character limits." App. 99. The court also determined that the scope of the review was reasonable for this purpose. App. 103. Denying summary judgment, the district court ruled that a jury would decide "which was the primary purpose" of the review. *Id.*

A jury found that Chief Scharf's purpose in ordering review of the transcripts was to determine the character limit's efficacy. App. 119. As a result, the district court ruled there was no Fourth

Amendment violation, and judgment was entered in favor of defendants. App. 119-120.

C. Plaintiffs' Appeal.

Plaintiffs appealed, challenging, among other rulings, the denial of their motion for summary judgment. Ontario defendants responded that the judgment in their favor should be affirmed on the ground (among others) that *their* motion for summary judgment should have been granted because, as a matter of law, plaintiffs had no reasonable expectation of privacy and the review of the pager transcripts was reasonable under *either* purpose submitted to the jury. Ontario defendants relied on the "firmly entrenched rule" that, even without cross-appealing, an appellee may assert any ground for affirmance that is apparent on the record as long as the appellee does not seek to enlarge the relief obtained below. *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 479-480 (1999).

The Ninth Circuit reversed, in an opinion authored by Judge Wardlaw and joined by Judge Pregerson and District Judge Leighton (sitting by designation). The panel ruled that plaintiffs were entitled to summary judgment in their favor against the City and the Department. App. 40. Applying the *O'Connor* "operational realities of the workplace" standard, 480 U.S. at 717, the panel concluded Sergeant Quon had a reasonable expectation of privacy

based on Lieutenant Duke's informal accommodation allowing officers to pay for overages. App. 29-30.

The panel also held that the other three plaintiffs had a reasonable expectation of privacy in messages they had sent to Sergeant Quon's pager, but not based on Lieutenant Duke's bill-paying arrangement. App. 27 n.6. Rather, analogizing text messages to email messages, regular mail, and telephone communications (App. 23-28), the panel concluded that, "[a]s a matter of law, Trujillo, Florio, and Jerilyn Quon had a reasonable expectation that the Department would not review their messages absent consent from either a sender or recipient of the text messages." App. 28-29.

In evaluating the reasonableness of the search under *O'Connor*, the panel concluded that given the jury's special verdict that the purpose of the search was to determine the character limit's efficacy, the search was reasonable at its inception to ensure that officers were not being required to pay for work-related expenses. App. 33-34. Nevertheless, relying on *Schowengerdt v. General Dynamics Corp.*, 823 F.2d 1328, 1336 (9th Cir. 1987), the panel reasoned that if "less intrusive methods" were feasible, then the search was unreasonable. App. 35. The panel hypothesized that there were "a host of simple ways" the Department could have conducted its administrative investigation without intruding on plaintiffs' Fourth Amendment rights. *Id.* The panel therefore concluded that the search violated the Fourth Amendment as a matter of law. App. 36, 39.

D. Ontario Defendants' Rehearing Petition.

The City and the Department petitioned for panel rehearing and rehearing en banc on the grounds that: (1) the panel's ruling on a government employee's reasonable expectation of privacy in text messaging on a government-issued pager dramatically undermined the "operational realities of the workplace" standard of *O'Connor*, 480 U.S. at 717 (plurality opinion); (2) the panel erroneously overextended Fourth Amendment protection with its sweeping ruling that individuals who send text messages to a government employee's workplace pager—rather than to a privately owned pager—reasonably expect that their messages will be free from the employer's review; and (3) the panel's reliance on *Schowengerdt*'s "less intrusive methods" analysis required review in light of this Court's and other circuits' "repeatedly" rejecting the "existence of alternative 'less intrusive' means" as a basis for evaluating the reasonableness of government activity under the Fourth Amendment, as exemplified in *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 629 n.9 (1989) (citations omitted). The United States filed an amicus curiae brief supporting the petition. App. 158-180.

Panel rehearing and rehearing en banc were denied. App. 125. However, Judge Ikuta, joined by six other judges, dissented from the denial of rehearing en banc. App. 136-150. The dissent disagreed with the panel's conclusion that the search violated the Fourth Amendment for two main reasons:

- "First, in ruling that the SWAT team members had a reasonable expectation of privacy in the messages sent from and received on pagers provided to officers for use during SWAT emergencies, the panel undermines the standard established by the Supreme Court in *O'Connor v. Ortega*, 480 U.S. 709 (1987), to evaluate the legitimacy of non-investigatory searches in the work-place." App. 136-137 (parallel citations omitted).

- "Second, the method used by the panel to determine whether the search was reason-able conflicts with binding Supreme Court precedent, in which the Court has repeatedly held that the Fourth Amendment does not require the government to use the 'least intrusive means' when conducting a 'special needs' search. *See Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822, 837 (2002); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 663 (1995); *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 629 n.9 (1989)." App. 137 (parallel citations omitted).

Judge Wardlaw filed an opinion concurring in the denial of rehearing en banc, asserting the dissent was mistaken as to the facts and the law. App. 125-136.

SUMMARY OF ARGUMENT

The Ninth Circuit panel viewed this case as an opportunity to explore what it considered "a new frontier in Fourth Amendment jurisprudence that has been little explored"—"[t]he recently minted standard of electronic communication via e-mails, text messages, and other means[.]" App. 23-24. Even privacy advocates marveled at the extent to which the court extended Fourth Amendment protection to messages sent and received on an employer-issued text-messaging pager.[2] The problem is that the Ninth Circuit failed to appreciate the most salient facts of the case: that Sergeant Quon was a SWAT officer using a text-messaging pager provided by the police department to facilitate SWAT operations; that the City had a written no-privacy policy that applied to the pager; and that any messages exchanged on the pager were potentially subject to disclosure under the California Public Records Act.

Summarizing two of the Ninth Circuit panel's errors, the opinion dissenting from the denial of rehearing en banc stated:

> [b]y holding that a SWAT team member has a reasonable expectation of privacy in the

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[2] *E.g.*, Jennifer Granick, *New Ninth Circuit Case Protects Text Message Privacy from Police and Employers*, Electronic Frontier Foundation, June 18, 2008, http://www.eff.org/deeplinks/2008/06/new-ninth-circuit-case-protects-text-message-priva ("[E]ven if your employer pays for your use of third party text or email services, your boss can't get copies of your messages from that provider without your permission. Wow.").

> messages sent to and from his SWAT pager, despite an employer's express warnings to the contrary and "operational realities of the workplace" that suggest otherwise, and by requiring a government employer to demonstrate that there are no . . . less intrusive means available to determine whether its wireless contract was sufficient to meet its needs, the panel's decision is contrary to "the dictates of reason and common sense" as well as the dictates of the Supreme Court.

App. 149-150. Compounding those two errors, the Ninth Circuit extended Fourth Amendment protection to the other plaintiffs, who knowingly exchanged text messages with Sergeant Quon on his SWAT pager.

As a result, the Ninth Circuit ruled that plaintiffs should have been granted summary judgment. The court erred; it was the City, the Department, and the Chief who were entitled to summary judgment.

In *O'Connor v. Ortega*, 480 U.S. 709 (1987), two enduring principles were announced regarding application of the Fourth Amendment to a government workplace search: first, to warrant Fourth Amendment protection, a government employee's expectation of privacy must be one "'that society is prepared to consider reasonable'" under the "operational realities of the workplace," *id.* at 715, 717 (plurality opinion); *see also id.* at 737 (Blackmun, J., dissenting) (agreeing that "in certain situations, the 'operational realities' of the workplace may remove some expectation of privacy on the part of the employee"); and

second, given a government employer's special needs, it may conduct work-related workplace searches as long they are reasonable. *Id.* at 725-726 (plurality opinion); *see also id.* at 732 (Scalia, J., concurring in the judgment). Since then, *O'Connor*'s core principles have been amplified in this Court's decisions involving broader principles that the government acting as an employer is less constitutionally restricted than when acting as sovereign and that citizens who accept public employment must also accept limitations on their constitutional rights.

The Ninth Circuit opinion contravenes these principles in multiple ways.

First, the opinion dramatically undercuts *O'Connor*'s "operational realities of the workplace" standard. The Ninth Circuit mistakenly reasoned that the employer's explicit no-privacy policy was abrogated by a lower-level supervisor's informal arrangement regarding his review of text messages for bill-paying purposes, and discounts entirely the potential disclosure of the messages under public records laws. As the judges dissenting from the denial of rehearing en banc noted: "In doing so, the panel improperly hobbles government employers from managing their workforces." App. 137.

O'Connor requires considering *all* the circumstances making up the operational realities of the workplace in determining whether a public employee's expectation of privacy is objectively reasonable.

- First and foremost here is the fact that Sergeant Quon was a SWAT leader in a public police force who was using a pager issued by the Department to facilitate logistical communications during SWAT emergencies, circumstances in which it would be unreasonable to assume the pager communications "would not be subsequently reviewed by an investigating board, subjected to discovery in litigation arising from the incidents, or requested by the media." App. 142 (Ikuta, J., dissenting from denial of rehearing en banc).

- Sergeant Quon also was subject to the City's official written policy warning employees not to expect privacy in e-mail communications on the City's equipment, and he was told that policy applied to the pager. No-privacy policies like this one are prevalent and vital to public employers for maintaining the security and efficiency of electronic communications equipment.

- The public also had potential access to transcripts of messages on Sergeant Quon's Department-issued pager under the California Public Records Act. Under that statute, public records are defined broadly, and exemptions construed narrowly, to promote government accountability to the public, an especially strong concern in the case of a SWAT officer's government-issued pager. Sergeant Quon and the other plaintiffs chose to exchange their messages in a medium to which the public had potential access.

> Contrary to the Ninth Circuit's reasoning, it does not matter how frequently the public had made requests for public employees' text messages—the salient fact is that the text messages were potentially open to any member of the public who requested them.

Against all these circumstances, the Ninth Circuit relied exclusively on the informal arrangement of a non-policymaking administrative officer—Lieutenant Duke—as defining the operational realities of the workplace. But Lieutenant Duke's accommodation for bill-paying purposes could not reasonably be interpreted by a SWAT leader such as Sergeant Quon as meaning that, absent his consent, the text messages would under all circumstances be free from review by either the Department or the public.

Second, in holding that the scope of the police department's review of transcripts of the messages that Sergeant Quon exchanged on his Department-issued pager was unreasonable, the Ninth Circuit relied on a "less intrusive methods" analysis that this Court and many other circuits have rejected as a basis for evaluating the reasonableness of government activity under the Fourth Amendment. *E.g.*, *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 629 n.9 (1989) (citations omitted). The Ninth Circuit's "less intrusive methods" approach not only conflicts with those authorities, but also, as the dissenting judges discerned, "makes it exceptionally difficult for public employers to go about the business of running government offices." App. 137.

Even if there were a reasonable expectation of privacy in the text messages under *O'Connor*, the Department's review was lawful under the Fourth Amendment because it was justified at its inception—for the purpose (as the jury found) of determining the efficacy of the monthly character limit *or* for the purpose of investigating whether officers were misusing the pagers—and was reasonable in scope, i.e., reasonably related to the purposes necessitating the search. *O'Connor*, 480 U.S. at 726 (plurality opinion). Unlike the Ninth Circuit, which inappropriately hypothesized its own "less intrusive" methods of conducting the review, the district court carefully considered the actual search undertaken by the Department and properly concluded it was reasonable.

Because the search was justified at its inception for either reason identified by the district court and was reasonable in scope, the Ninth Circuit erred in determining that plaintiffs' summary judgment motion should have been granted and that Ontario defendants' summary judgment motion should not have been granted. This Court should so hold to reflect the proper balance between the minimal interests that plaintiffs had in exchanging personal messages on Sergeant Quon's pager, while he was on duty, against the important interests of the police department in managing the efficient, safe, and effective uses of its resources.

Third, the Ninth Circuit compounded the erroneous resolution of Sergeant Quon's claim by also extending Fourth Amendment protection to the other

three plaintiffs as well. These plaintiffs, who knowingly exchanged text messages with a police officer on his *police department* pager—rather than on a privately owned pager—could not reasonably expect that their messages would be free from the department's review in its capacity as a public employer. Privacy cannot reasonably be expected because public employers, as well as private ones, typically have no-privacy policies governing electronic communications and computer usage. Moreover, extending Fourth Amendment protection to the other plaintiffs only further hobbles public employers' ability to effectively and efficiently utilize electronic communications equipment and enforce no-confidentiality policies.

Accordingly, this Court should reverse the Ninth Circuit and order it to affirm the district court judgment in favor of Ontario defendants in order to (a) restore reasonableness to the *O'Connor* "operational realities of the [government] workplace" standard; (b) settle once and for all the inapplicability of any "less-intrusive means" analysis under the Fourth Amendment; and (c) curb the Ninth Circuit's startling extension of Fourth Amendment privacy rights to individuals who exchange electronic communications with government employees on the employees' government-issued communications devices.

ARGUMENT

I. A PUBLIC EMPLOYEE'S FOURTH AMENDMENT RIGHTS VIS-À-VIS AN EMPLOYER ARE TEMPERED BY THE "OPERATIONAL REALITIES" OF THE PUBLIC WORKPLACE AND THE PUBLIC EMPLOYER'S SPECIAL NEEDS TO CONDUCT WORK-RELATED SEARCHES.

A. *O'Connor v. Ortega* Established The "Operational Realities Of The Workplace" Principle Governing Public Employee Expectations Of Privacy And The "Special Needs" Principle Of Public Employers To Conduct Reasonable Workplace Searches.

The Fourth Amendment applies to "[s]earches and seizures by government employers or supervisors of the private property of their employees[.]" *O'Connor v. Ortega*, 480 U.S. 709, 715 (1987) (plurality opinion); *see also id.* at 730-731 (Scalia, J., concurring in the judgment); *id.* at 732-733 (Blackmun, J., dissenting). But the Fourth Amendment is implicated only where the search "infringe[s] 'an expectation of privacy that society is prepared to consider reasonable.'" *O'Connor*, 480 U.S. at 715 (plurality opinion) (quoting *United States v. Jacobsen*, 466 U.S. 109, 113 (1984)); *see also Smith v. Maryland*, 442 U.S. 735, 740 (1979); *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

"The operational realities of the workplace . . . may make *some* employees' expectations of privacy

unreasonable when an intrusion is by a supervisor rather than a law enforcement official." *O'Connor*, 480 U.S. at 717 (plurality opinion); *id.* at 737 (Blackmun, J., dissenting) ("[I]n certain situations, the 'operational realities' of the workplace may remove some expectation of privacy on the part of the employee."). Thus, "[p]ublic employees' expectations of privacy in their offices, desks, and file cabinets, like similar expectations of employees in the private sector, may be reduced by virtue of actual office practices and procedures, or by legitimate regulation." *O'Connor*, 480 U.S. at 717 (plurality opinion).

Even where the operational realities of the government workplace do not foreclose a reasonable expectation of privacy, however, the "special needs" of a government employer—to provide services to the public promptly and efficiently—make the warrant and probable cause requirements of the Fourth Amendment impracticable. *O'Connor*, 480 U.S. at 722-725 (plurality opinion); *see also id.* at 732 (Scalia, J., concurring in the judgment) ("Such 'special needs' are present in the context of government employment."). Accordingly, public employers' searches for noninvestigatory, work-related purposes and for investigations of work-related misconduct are "judged by the standard of reasonableness under all the circumstances." *O'Connor*, 480 U.S. at 725-726 (plurality opinion); *see also id.* at 732 (Scalia, J., concurring in the judgment) ("[G]overnment searches to retrieve work-related materials or to investigate violations of workplace rules—searches of the sort

that are regarded as reasonable and normal in the private-employer context—do not violate the Fourth Amendment.").

B. *O'Connor*'s Principles Have Resonated In This Court's Decisions Under The Fourth Amendment And More Generally In The Public Employment Context.

In a variety of Fourth Amendment contexts, this Court has reaffirmed *O'Connor* and its core principles that the operational realities of the workplace may diminish employee expectations of privacy and that government employers may conduct reasonable workplace searches without a warrant or probable cause. For example, shortly after *O'Connor* was decided, the Court upheld regulations permitting state probation officers to search a probationer's home based on "reasonable grounds" without a warrant. *Griffin v. Wisconsin*, 483 U.S. 868, 870-873 (1987). *Griffin* analogized to *O'Connor*'s public employment context, describing "a situation in which there is an ongoing supervisory relationship—and one that is not, or at least not entirely, adversarial—between the object of the search and the decisionmaker." *Id.* at 879.

Two years later, in *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 679 (1989), the Court rejected in large part a Fourth Amendment challenge to a drug-screening program that required urinalysis tests of government employees seeking

transfer or promotion. The Court relied on *O'Connor* for a number of principles, including that:

> • "requiring the Government to procure a warrant for every work-related intrusion would conflict with the common-sense realization that government offices could not function if every employment decision became a constitutional matter[,]" *Nat'l Treasury Employees Union*, 489 U.S. at 666 (internal quotation marks and citation omitted);
>
> • "the traditional probable-cause standard may be unhelpful in analyzing the reasonableness of routine administrative functions[,]" *id.* at 668 (citation omitted); and
>
> • "the operational realities of the workplace may render entirely reasonable certain work-related intrusions by supervisors and co-workers that might be viewed as unreasonable in other contexts." *Id.* at 671 (internal quotation marks and citation omitted).

The same day, in *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989), the Court upheld government-mandated drug and alcohol testing of railroad employees, relying on *O'Connor* for another key Fourth Amendment principle operative in the government employment context: that "[w]hen faced with such special needs, we have not hesitated to balance the governmental and privacy interests to

assess the practicality of the warrant and probable-cause requirements in the particular context." *Id.* at 619; *see also id.* at 620.

Several years later, this Court returned to *O'Connor* in upholding a public school district's drug policy requiring urine testing of student athletes. *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 665 (1995). There, the Court analogized the school drug testing to the workplace search in *O'Connor* as follows:

> Just as when the government conducts a search in its capacity as employer (a warrantless search of an absent employee's desk to obtain an urgently needed file, for example), the relevant question is whether that intrusion upon privacy is one that a reasonable employer might engage in, see [*O'Connor*]; so also when the government acts as guardian and tutor the relevant question is whether the search is one that a reasonable guardian and tutor might undertake.

Id. O'Connor has thus become woven into the fabric of this Court's Fourth Amendment jurisprudence.

Even outside the Fourth Amendment context, *O'Connor* constitutes an important strand in this Court's public employment jurisprudence. Recently, in *Engquist v. Oregon Department of Agriculture*, 128 S. Ct. 2146 (2008), the Court held that a class-of-one equal protection claim is not cognizable in the context of public employment. Echoing *O'Connor*, the Court emphasized that when the government acts in its

capacity as employer—rather than as sovereign—it has a significant interest in "achieving its goals as effectively and efficiently as possible[.]" *Id.* at 2151 (citation and internal quotation marks omitted). The Court cited precedent going as far back as *Ex parte Curtis*, 106 U.S. 371, 373 (1882), for the proposition that "the government has a legitimate interest in promoting efficiency and integrity in the discharge of official duties, and in maintaining proper discipline in the public service[.]" *Engquist*, 128 S. Ct. at 2151 (internal quotation marks and brackets omitted).

Engquist summarized *O'Connor* as follows: "[a]lthough we recognized that the 'legitimate privacy interests of public employees in the private objects they bring to the workplace may be substantial,' we found that '[a]gainst these privacy interests . . . must be balanced the realities of the workplace, which strongly suggest that a warrant requirement would be unworkable.'" 128 S. Ct. at 2151 (quoting *O'Connor*, at 480 U.S. at 721 (plurality opinion)). More broadly, *Engquist* identified *O'Connor* as exemplifying the Court's "recogni[tion] that government has significantly greater leeway in its dealings with citizen employees than it does when it brings its sovereign power to bear on citizens at large." *Id.*

The concomitant was recognized not long before *Engquist*, in *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006): "[w]hen a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom." Emphasizing that a government employer needs more control over its employees' speech than over citizens' speech, the

Court held that a deputy district attorney's official statements were not protected from employer discipline by the First Amendment. *Id.* at 418-424; *see also id.* 434 (Souter, J., dissenting) (agreeing with majority that "government needs civility in the workplace, consistency in policy, and honesty and competence in public service").

Resonating the special considerations that *O'Connor* found to temper a public employee's Fourth Amendment rights, "two main principles" thus inform this Court's government employment cases:

> • "First, although government employees do not lose their constitutional rights when they accept their positions, those rights must be balanced against the realities of the employment context." *Engquist*, 128 S. Ct. at 2152.
>
> • "Second, in striking the appropriate balance, we consider whether the asserted employee right implicates the basic concerns of the relevant constitutional provision, or whether the claimed right can more readily give way to the requirements of the government as employer." *Id.*

In this case, these principles frame the Ninth Circuit's error in invalidating the Department's reasonable review of the transcripts of text messages sent and received on a Department-issued pager, messages in which Sergeant Quon and the other plaintiffs had no reasonable expectation of privacy.

II. UNDER THE FOURTH AMENDMENT, IN LIGHT OF THE OPERATIONAL REALITIES OF THE ONTARIO POLICE DEPARTMENT, SERGEANT QUON HAD NO REASONABLE EXPECTATION OF PRIVACY IN TEXT MESSAGES ON A POLICE DEPARTMENT PAGER.

A. Using A Pager Issued By The Police Department For SWAT Operations Diminished Any Expectation Of Privacy In The Text Messages.

A government "employee's expectation of privacy must be assessed in the context of the employment relation." *O'Connor*, 480 U.S. at 717 (plurality opinion). Here, the employment relation is that between police officer and police department. Whatever expectation of privacy a sender or recipient of text messages on a government employer's equipment can ever legitimately have—if any[3]—certainly none existed within the operational realities of the Ontario Police Department.

"Public employees . . . often occupy trusted positions in society." *Garcetti*, 547 U.S. at 419. This Court

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[3] In its amicus brief supporting rehearing en banc, the United States pointed out the serious analytical errors in the Ninth Circuit's conclusions, arguing, among other things, that there generally is no reasonable expectation of privacy in text messages sent and received. App. 163-180.

has recognized that police officers' constitutional rights as public employees are not equivalent to their rights as private citizens. *E.g.*, *Kelley v. Johnson*, 425 U.S. 238, 245 (1976) (recognizing as "highly significant" that police officer brought § 1983 liberty interest challenge to hair-grooming standards as a public employee and "not as a member of the citizenry at large"). Thus, "[p]rivate citizens perhaps cannot be prevented from wearing long hair, but policemen can." *Rutan v. Repub. Party of Ill.*, 497 U.S. 62, 94 (1990) (Scalia, J., dissenting) (citing *Kelley*, 425 U.S. at 247). The Ninth Circuit too had previously recognized, in the context of a police officer suing a police department, that the public legitimately holds police officers to more rigorous standards of conduct than ordinary citizens. *Dible v. City of Chandler*, 515 F.3d 918, 928 (9th Cir. 2008); *see also Los Angeles Police Protective League v. Gates*, 907 F.2d 879, 885 (9th Cir. 1990).

But in this case, the Ninth Circuit ignored that Sergeant Quon was a police officer using a police pager. As the dissenting judges correctly discerned, "[g]iven that the pagers were issued for use in SWAT activities, which by their nature are highly charged, highly visible situations, it is unreasonable to expect that messages sent on pagers provided for communication among SWAT team members during those emergencies would not be subsequently reviewed by an investigating board, subjected to discovery in

litigation arising from the incidents, or requested by the media." App. 142. All the more true as to Sergeant Quon, who was, in his own words, a "team leader, team sergeant, responsible for training and planning of the execution of high-risk warrants, also rescue, all the tactical stuff." J.A. 46-47.

Any reasonable police officer—let alone a SWAT leader—understands these operational realities and necessarily would have a reduced expectation of privacy in text messages on a Department-issued pager, particularly messages sent while on duty.

B. The City's Explicit No-Privacy Policy Further Diminished Any Expectation Of Privacy.

"[L]egitimate regulation" may reduce public employees' expectations of privacy in the workplace. *O'Connor*, 480 U.S. at 717 (plurality opinion). Significantly, in *O'Connor*, "there was no evidence that the Hospital had established any reasonable regulation or policy discouraging employees such as Dr. Ortega from storing personal papers and effects in their desks or file cabinets . . . ." 480 U.S. at 719 (plurality opinion).

Most employers, however, do have explicit no-privacy policies regarding computers and electronic communications equipment. "[T]he abuse of access to workplace computers is so common (workers being

prone to use them as media of gossip, titillation, and other entertainment and distraction) that reserving a right of inspection is so far from being unreasonable that the failure to do so might well be thought irresponsible." *Muick v. Glenayre Elecs.*, 280 F.3d 741, 743 (7th Cir. 2002); *see also TBG Ins. Servs. Corp. v. Superior Court*, 96 Cal. App. 4th 443, 451-452, 117 Cal. Rptr. 2d 155 (2002) (no reasonable expectation of privacy in computer provided for employee's home use, noting that "more than three-quarters of this country's major firms monitor, record, and review employee communications and activities on the job, including their telephone calls, e-mails, Internet connections, and computer files").

In particular, "numerous government agencies," like the City of Ontario, have adopted "policies [that] typically require employees to acknowledge that their e-mail records are subject to inspection, monitoring, and public disclosure; that they have no right of privacy or any reasonable expectation of privacy in workplace e-mails; that the e-mails are owned by the agency, not the employee; and that e-mails are presumptively considered to be public records." Peter S. Kozinets, *Access to the E-Mail Records of Public Officials: Safeguarding the Public's Right to Know*, 25 Comm. Law. 17, 23 (Summer 2007). For example, the United States, as it pointed out in its amicus brief below, is "a public employer that extensively uses 'no confidentiality' policies with respect to the workplace and work-issued equipment[.]" App. 162. These "no confidentiality" policies "prevent abuse and promote

the public's safety and security." App. 162-163. They directly promote the very goals of government efficiency and effectiveness that *O'Connor* recognized and this Court continues to recognize. *Engquist*, 128 S. Ct. at 2151.

Here, of course, the City had a written no-privacy policy for e-mail and computer network use. The policy clearly reserved the City's right to "monitor and log all network activity including e-mail and Internet use," and it warned employees that "[u]sers should have no expectation of privacy or confidentiality when using these resources." App. 152, ¶ III.C. The policy further explained that access to the Internet and e-mail system was "not confidential" and that "information produced in either hard copy or electronic form is considered City property." App. 153, ¶ III.D. The acknowledgment form attached to the policy reiterated that employees should have "no expectation of privacy or confidentiality"—"barely two inches from the signature line." App. 173. Sergeant Quon and Sergeant Trujillo both executed the acknowledgment form. App. 156-157; S.E.R. 454-455. And Sergeant Quon attended a meeting at which it was made clear that the policy fully applied to the pagers, an announcement memorialized in writing in a memo from Chief Scharf to Sergeant Quon and the other attendees. App. 29, 156; *see also* J.A. 30, 61. Specifically, Sergeant Quon was informed that "the city owned and issued alphanumeric pagers were considered e-mail, and that those messages would fall

under the City's policy as public information and eligible for auditing." J.A. 30, 61.

As the United States argued: "[w]hen a written policy formally announces that parties 'should have no expectation of privacy or confidentiality,' a party's expectation of privacy cannot be one that 'society is prepared to consider reasonable[.]' " App. 173 (quoting *Illinois v. Caballes*, 543 U.S. 405, 408 (2005)). "Nothing could be more unreasonable than to expect privacy after being told there is none." App. 173.

Even the Ninth Circuit agreed that "[i]f that were all," the case would be governed by the rule that employees have no reasonable expectation of privacy where they have notice of employer policies permitting searches. App. 29 (citing *Muick*, 280 F.3d at 743 (employer's announcement that it might inspect laptop computers "destroyed any reasonable expectation of privacy that [employee] might have had and so scotches his claim") and *Bohach v. City of Reno*, 932 F. Supp. 1232, 1234-1235 (D. Nev. 1996) (any expectation of privacy in police pagers was diminished by department order warning that messages would be logged onto the system and banning certain types of messages)); *see also, e.g.*, *Biby v. Bd. of Regents*, 419 F.3d 845, 850-851 (8th Cir. 2005) (no reasonable expectation of privacy in employee's office computer files where state university warned users not to expect privacy); *United States v. Angevine*, 281 F.3d 1130, 1134-1135 (10th Cir. 2002) (no reasonable expectation of privacy in state university computer where university warned of no confidentiality on

university network); *United States v. Simons*, 206 F.3d 392, 398 (4th Cir. 2000) (no reasonable expectation of privacy in Internet use on office computer where federal agency's known policy allowed monitoring of employee computer activity); *compare Leventhal v. Knapek*, 266 F.3d 64, 74 (2d Cir. 2001) (Sotomayor, J.) (reasonable expectation of privacy where state agency had *not* "placed [employee] on notice that he should have no expectation of privacy in the contents of his office computer").

C. The California Public Records Act Further Diminished Any Expectation Of Privacy.

A related operational reality attendant to Sergeant Quon's employment as a SWAT officer was the public's potential access to the pager transcripts under the California Public Records Act ("CPRA") (Cal. Gov't Code § 6250, *et seq.*). As the dissenting judges correctly stated, "[g]overnment employees in California are well aware that every government record is potentially discoverable at the mere request of a member of the public, and their reasonable expectation of privacy in such public records is accordingly reduced." App. 142-143.

The dissent accurately reflects the public's robust right to obtain public records under the CPRA. As the California Supreme Court has reaffirmed, "'[i]mplicit in the democratic process is the notion that government should be accountable for its actions. In order to

verify accountability, individuals must have access to government files.'" *Int'l Fed'n of Prof'l & Technical Eng'rs v. Superior Court*, 42 Cal. 4th 319, 328-329, 64 Cal. Rptr. 3d 693, 165 P.3d 488 (2007).

Consonant with the public's need for access, the CPRA broadly defines a public record as any "writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." Cal. Gov't Code § 6252(e). Such records "must be disclosed unless one of the statutory exceptions applies." *Int'l Fed'n of Prof'l & Technical Eng'rs*, 42 Cal. 4th at 329. While the CPRA does provide numerous exemptions to the definition of "public record" (Cal. Gov't Code § 6254), those exemptions are "narrowly construed." *BRV v. Superior Court*, 143 Cal. App. 4th 742, 751, 756, 49 Cal. Rptr. 3d 519 (2006).

None of the specific, narrowly-construed exemptions expressly encompasses the transcripts of text messages that Sergeant Quon sent and received. If the public requested them, the Department likely would have to invoke the CPRA's "catch-all" provision, under which a public agency may justify withholding a record "by demonstrating that . . . on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record." Cal. Gov't Code § 6255(a). But this "catch-all" provision is quite limited, as it would require the Department "to demonstrate a 'clear overbalance' on

the side of confidentiality" to prevent disclosure. *BRV*, 143 Cal. App. 4th at 756. Making that showing would be difficult, at best, as to the hundreds of Sergeant Quon's text messages sent and received on his Department-issued pager, especially ones exchanged while he was on duty.

Police officers' text messages are particularly logical candidates for requests under public records laws because "'public issues,' indeed, matters of 'unusual importance,' are often daily bread-and-butter concerns for the police . . . ." *Garcetti*, 547 U.S. at 448 (Breyer, J., dissenting). A member of the public seeking the pager transcripts would have a strong argument that the public has a right to know what the police officers hired to protect the public are doing while on duty. "The public's legitimate interest in the identity and activities of peace officers is even greater than its interest in those of the average public servant." *Comm'n on Peace Officer Standards & Training v. Superior Court*, 42 Cal. 4th 278, 297, 64 Cal. Rptr. 3d 661, 165 P.3d 462 (2007). "'In order to maintain trust in its police department, the public must be kept fully informed of the activities of its peace officers.'" *Id.* (quoting *New York Times Co. v. Superior Court*, 52 Cal. App. 4th 97, 104-105, .60 Cal. Rptr. 2d 410 (1997), *disapproved on other grounds by Copley Press v. Superior Court*, 39 Cal. 4th 1272, 1297-1298, 48 Cal. Rptr. 3d 183, 141 P.2d 288 (2006)). That Sergeant Quon and the other plaintiffs chose to discuss highly personal matters in this context would not by itself prevent a member of

the public from obtaining the text messages; "[f]ear of possible opprobrium or embarrassment is insufficient to prevent disclosure." *New York Times*, 52 Cal. App. 4th at 104.

Underscoring the unreasonableness of any expectation of privacy, the principals to the communications—the plaintiffs in this case—would have "no right under [the] Act to prevent disclosure of the record to any other person." *Los Angeles Police Dep't v. Superior Court*, 65 Cal. App. 3d 661, 668, 135 Cal. Rptr. 575, 579 (1977). Only "the agency" has a right to assert an exemption to the CPRA. Cal. Gov't Code § 6255. Thus, even if, as plaintiffs argued below, purely personal messages would not be subject to disclosure to the public under the CPRA (E.R. 380), the City itself would have to review the transcripts just to determine which ones fell in that category. *E.g.*, *Denver Pub. Co. v. Bd. of County Comm'rs of County of Arapahoe*, 121 P.3d 190, 199 (Colo. 2005) ("To determine whether the records kept by the agency are public or non-public records, the agency must look to the content of the records to resolve whether they relate to the performance of public functions or involve the receipt or expenditure of public funds.").

The Ninth Circuit nevertheless reasoned that the CPRA would not preclude a reasonable expectation of privacy—even if the pager messages were public records—absent evidence that CPRA requests were sufficiently "'widespread or frequent[.]'" App. 32. But requests for public employee text messages as public

records are not rare. Many requests get litigated,[4] while others result in messages being turned over to the public without litigation.[5]

The Ninth Circuit's ruling overlooks an important principle noted in *O'Connor*: that "'[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.'" 480 U.S. at 718 (plurality opinion) (quoting *Katz*, 389 U.S. at 351); *id.* at 731 (Scalia, J., concurring in the judgment) (same). In the context of an invasion of privacy claim, this Court

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[4] *See, e.g., State ex rel. Glasgow v. Jones*, 119 Ohio St. 3d 391, 392, 894 N.E.2d 686 (2008) (request for Ohio General Assembly representative's text messages); *Denver Pub. Co.*, 121 P.3d at 192 (request for messages of elected official and public employee "sent using the County's e-mail and text-pager systems"); *Flagg v. City of Detroit*, 252 F.R.D. 346, 348 (E.D. Mich. 2008) (noting related state court action in which Detroit Free Press was seeking production of City officials' text messages under the Michigan Freedom of Information Act).

[5] *See, e.g.*, Tami Abdollah, *O.C. Sheriff's Officials Sent Mocking Texts at Board Meeting*, Los Angeles Times, February 4, 2009, http://articles.latimes.com/2009/feb/04/local/me-ocdeputies4 (noting that transcripts of Orange County, California sheriff's officials' text messages were released after "Ordinary California Citizens Concerned with Safety" filed public records request); *Text Messages Turned Over in Public Records Act Request*, Humboldt Mirror, posted March 6, 2008, http://humboldtmirror.wordpress.com/2008/03/06/text-messages-turned-over-in-public-records-act-request/ ("A string of text messages between Humboldt County Supervisor Bonnie Neely and several of her closest advisers was released late Thursday in response to a California Public Records Act request filed by the Humboldt Mirror.").

also has observed that "interests in privacy fade when the information involved already appears on the public record." *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 494-495 (1975). Sergeant Quon was specifically told that the pager messages "would fall under the City's [e-mail] policy as public information[.]" J.A. 30, 61. The policy itself warned that "[d]eletion of e-mail or other electronic information may not fully delete the information from the system" and that e-mail messages were "subject to 'access and disclosure' in the legal system and the media." App. 153, ¶¶ III.D., III.F.

This potential for public review eliminated any *legitimate* expectation of privacy. In *Smith v. Maryland*, this Court rejected an argument that there was a legitimate expectation of privacy in local telephone numbers dialed where, although telephone companies had the ability to record all telephone numbers dialed, "in view of their present billing practices, [they] usually do not record local calls." 442 U.S. at 745. As the Court explained, "[r]egardless of the phone company's election, petitioner voluntarily conveyed to it information that it had facilities for recording and that it was free to record." *Id.* Analogously here, any expectation of privacy when the messages may well have constituted matters of public record and were *potentially* accessible to the public through the CPRA was inherently unreasonable, no matter how frequently such requests are actually made.

D. Given These Operational Realities, No Reasonable Expectation Of Privacy Was Created By An Administrative Lieutenant's Informal Procedure Accommodating Some Personal Use Of The Pager.

Despite the police department setting, the official no-privacy policy, and the California Public Records Act, the Ninth Circuit concluded that a lack of any reasonable expectation of privacy "was not the 'operational reality' at the Department." App. 30. The court reasoned that "'Lieutenant Duke made it clear to the staff, and to Quon in particular, that he would *not* audit their pagers so long as they agreed to pay for any overages.'" *Id.* Here, the Ninth Circuit mistakenly relied on Lieutenant Duke's informal accommodation—in the face of the Department's express policy—as determinative of whether an expectation of privacy in the text messages was reasonable. This accommodation was incapable of supporting a reasonable expectation of privacy for multiple reasons.

Foremost, Lieutenant Duke's statements concerned auditing messages based on overages, *i.e.*, an accounting audit, not officers' privacy rights vis-à-vis the Department. His bill-paying arrangement was, as the district court aptly characterized it, his "generous way of streamlining administration and oversight over the use of the pagers because, as he reminded [Sergeant] Quon, he could, 'if anybody wished to challenge their overage, . . . audit the text transmissions to verify how many were non-work related.'" App. 50.

Not surprisingly, since Lieutenant Duke's responsibility was merely to oversee administrative aspects of the pagers, he never said that his bill-paying accommodation would prevent the Department from ever reviewing the messages for investigatory or administrative purposes. What if, for example, the Department was required to review communications concerning a SWAT shooting in response to media inquiries? Or to produce those communications in litigation? Sergeant Quon could not reasonably expect that Lieutenant Duke's bill-paying accommodation would totally shield the contents of text messages sent on the Department-issued pager from Department review. Indeed, the City's no-privacy policy specifically warned officers that "messages are also subject to 'access and disclosure' in the legal system and the media." App. 153, ¶ III.F.

Lieutenant Duke, in fact, lacked the power to countermand the official policy because—as the Ninth Circuit acknowledged but dismissed as unimportant—he was not a Department policymaker. App. 31. The written policy itself underscored the importance of the policymakers' decision by noting that any dispute as to whether "a specific e-mail fits the criteria of 'light' personal communications" would be decided by "the Agency Head or Department Director." App. 153, ¶ III.F. This further rendered unreasonable any reliance on Lieutenant Duke's accommodation as creating Fourth Amendment privacy rights vis-à-vis the Department. *Cf. Bennett v. City of Eastpointe*, 410 F.3d 810, 819 (6th Cir. 2005)

(plaintiffs could not base section 1983 claims on memorandum that had been written by current police chief when he was "simply a lieutenant, and not a policy-making official"). But even more important, it rendered unsound the Ninth Circuit's decision to exalt Lieutenant Duke's accommodation above all the other operational realities of the Department workplace.

No doubt thousands of government offices throughout the nation have employees like Lieutenant Duke overseeing day-to-day implementation of other employees' use of ever-evolving forms of electronic communications, from e-mailing to text messaging to instant messaging to "tweeting." It is simply unrealistic to prevent informal statements that arguably contradict formal no-privacy policies. But that does not make it reasonable under the Fourth Amendment for government employees to ignore official, explicit no-privacy policies to the contrary. In light of the Department's official policy, no *legitimate* expectation of privacy would be fostered by Lieutenant Duke's election not to review the messages. *See Smith v. Maryland*, 442 U.S. at 745.

As the United States explained below, the panel's error "puts into doubt employee agreements and privacy policies used across the private sector and government to assist internal investigators in identifying possible corruption, threats to security, or abuse of government resources or authority." App. 172-173. After all, under the Ninth Circuit's reasoning, "[i]f an Information Technology specialist or general manager

gives employees the impression that the company will not actually conduct surveillance, then the employee may be found to have enjoyed a reasonable expectation of privacy that then limits how the employer may conduct a workplace search." Justin Conforti, *Somebody's Watching Me: Workplace Privacy Interests, Technology Surveillance, and the Ninth Circuit's Misapplication of the* Ortega *test in* Quon v. Arch Wireless, 5 Seton Hall Cir. Rev. 461, 486 (2008-2009).

* * *

Whether an expectation of privacy was objectively reasonable must be evaluated under the totality of the operational realities, not by ignoring the police department context and the City's no-privacy policy and downplaying the potential for public disclosure. Permitting informal accommodations for bill-paying purposes to trump public employers' explicit no-privacy policies effectively eviscerates those policies and turns the "operational realities" standard on its head.

This Court therefore should take this opportunity to restore reasonableness and common sense to *O'Connor*'s "operational realities of the workplace" standard by holding that Sergeant Quon had no reasonable expectation of privacy. "Without a reasonable expectation of privacy, a workplace search by a public employer will not violate the Fourth Amendment, regardless of the search's nature and scope." *Leventhal*, 266 F.3d at 73. Ontario defendants were

therefore entitled to summary judgment. The Court should reverse and instruct the Ninth Circuit to affirm the district court judgment in favor of Ontario defendants.

III. THE NINTH CIRCUIT ERRONEOUSLY USED A "LESS INTRUSIVE METHODS" ANALYSIS TO INVALIDATE THE DEPARTMENT'S SPECIAL-NEEDS REVIEW OF THE TEXT MESSAGES, WHICH WAS REASONABLE AND THEREFORE LAWFUL UNDER THE FOURTH AMENDMENT.

Even if Sergeant Quon had had a reasonable expectation of privacy in the text messages, the Department's review of the transcripts would pass Fourth Amendment muster so long as the search was "reasonable" under the circumstances. *O'Connor*, 480 U.S. at 725-726 (plurality opinion); *see also id.* at 732 (Scalia, J., concurring in the judgment).

To determine whether a search is reasonable, the Court "'balanc[es] [the search's] intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.'" *Vernonia*, 515 U.S. at 652-653 (citations omitted). The Ninth Circuit did not adequately balance the competing interests: the plaintiffs' minimal interests in using Sergeant Quon's *Department-issued* pager for personal communications—even highly private, sexually graphic ones (*see* S.E.R. 532, 539, 546, 551-553)—against the Department's "direct and

overriding interest in ensuring that the work of the agency is conducted in a proper and efficient manner." *O'Connor*, 480 U.S. at 724 (plurality opinion). "[T]he interest of the City in maintaining the effective and efficient operation of the police department is particularly strong." *Dible*, 515 F.3d at 928.

In balancing the requirements of a public employer and the rights of a public employee, it is pertinent that here the employee's asserted right to privacy in text messages on a workplace pager does not even strongly "implicate[ ] the basic concerns of the relevant constitutional provision." *Engquist*, 128 S. Ct. at 2152. It is privacy in the home—not the workplace—that lies "'[a]t the very core' of the Fourth Amendment." *Kyllo v. United States*, 533 U.S. 27, 31 (2001) (at core of Fourth Amendment "'stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion'"). *O'Connor* thus teaches that "privacy interests of government employees in their place of work . . . are far less than those found at home or in some other contexts." 480 U.S. at 725 (plurality opinion).

O'Connor further explains that "[g]overnment offices are provided to employees for the sole purpose of facilitating the work of an agency[,]" and "[t]he employee may avoid exposing personal belongings at work by simply leaving them at home." 480 U.S. at 725 (plurality opinion). Analogously here, "Quon could have avoided exposure of his sexually explicit

text messages simply by using his own cell phone or pager." App. 143 (Ikuta, J., dissenting from denial of rehearing en banc). The City and Department should not be punished because a legitimate workplace search happened to turn up sexually explicit messages that plaintiffs need not and should not have sent on government-issued equipment in the first place. *Cf. Simons*, 206 F.3d at 400 (government employer "did not lose its special need for 'the efficient and proper operation of the workplace' [under *O'Connor*] merely because the evidence obtained was evidence of a crime").

Ignoring this lopsided imbalance of legitimate interests, the Ninth Circuit instead applied its own "less intrusive methods" test to invalidate what was a perfectly reasonable review of text messages undertaken by the Department in its role as a public employer. As we explain, this test has been thoroughly discredited—for excellent reasons.

A. The Ninth Circuit Opinion Endorsed And Applied A Disapproved "Less Intrusive Methods" Test For Determining Whether The Department's Action Was Reasonable.

This Court has "repeatedly" rejected the "existence of alternative 'less intrusive' means" as a basis for evaluating the reasonableness of government activity under the Fourth Amendment. *Skinner*, 489 U.S. at 629 n.9 (citations omitted). *Skinner* involved an employment-related search. *Id.* at 606 (drug and

alcohol testing of railroad employees). But for decades the Court has rejected the "less intrusive means" mode of analysis in a variety of Fourth Amendment contexts. *See, e.g.*, *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822, 837 (2002) (suspicionless urinalysis of students participating in competitive extracurricular activities); *Vernonia*, 515 U.S. at 663 (random urinalysis testing of student athletes); *United States v. Montoya de Hernandez*, 473 U.S. 531, 542 (1985) (16-hour detention of suspected alimentary canal smuggler by customs officials); *United States v. Sharpe*, 470 U.S. 675, 686-687 (1985) (20-minute *Terry* stop of pickup truck driver by DEA agent); *Illinois v. Lafayette*, 462 U.S. 640, 647 (1983) (administrative search of arrestee's personal effects at police station); *Cady v. Dombrowski*, 413 U.S. 433, 447 (1973) (warrantless search of car trunk).

Skinner reiterated why "less intrusive means" analysis is inappropriate:

> It is obvious that the logic of such elaborate less-restrictive-alternative arguments could raise insuperable barriers to the exercise of virtually all search-and-seizure powers . . . because judges engaged in post hoc evaluations of government conduct can almost always imagine some alternative means by which the objectives of the government might have been accomplished.

489 U.S. at 629 n.9 (internal citations and quotations omitted). Even more recently, this Court re-affirmed these principles and again rejected parties' suggestions

that less intrusive means could have been employed to effect searches in *Vernonia*, 515 U.S. at 663, and in *Earls*, 536 U.S. at 837.

Until this Ninth Circuit opinion, the circuit courts were uniformly in compliance. As the dissenting opinion below points out, "[s]even other circuits have followed the Supreme Court's instruction and explicitly rejected a less intrusive means inquiry in the Fourth Amendment context." App. 147-149 (citing *Davenport v. Causey*, 521 F.3d 544, 552 (6th Cir. 2008); *Lockhart-Bembery v. Sauro*, 498 F.3d 69, 76 (1st Cir. 2007); *Cassidy v. Chertoff*, 471 F.3d 67, 79 (2d Cir. 2006); *Shell v. United States*, 448 F.3d 951, 956 (7th Cir. 2006); *United States v. Prevo*, 435 F.3d 1343, 1348 (11th Cir. 2006); *Shade v. City of Farmington*, 309 F.3d 1054, 1061 (8th Cir. 2002); *United States v. Melendez-Garcia*, 28 F.3d 1046, 1052 (10th Cir. 1994)). Even the Ninth Circuit previously had acknowledged that "the government does not have to use the least restrictive means to further its interests." *Yin v. California*, 95 F.3d 864, 870 (9th Cir. 1996) (citing *Vernonia*); *accord*, *Int'l Bhd. of Teamsters v. Dep't of Transp.*, 932 F.2d 1292, 1305 (9th Cir. 1991) (citing *Skinner*).

The Ninth Circuit opinion in this case conflicts with this wall of authority by pursuing "less intrusive methods" under its pre-*Skinner* opinion in *Schowengerdt v. General Dynamics Corp.*, 823 F.2d 1328, 1336 (9th Cir. 1987). *Schowengerdt* had added a "less intrusive methods" and "no broader than necessary" gloss to the *O'Connor* analysis. *Id.*

But the Ninth Circuit's "less intrusive means" gloss from *Schowengerdt*—and now this case—is not only foreclosed by the above authorities, it is incompatible with *O'Connor* itself. *O'Connor* expressly concluded that a court "must determine whether the search as *actually conducted* 'was *reasonably related* in scope to the circumstances which justified the interference in the first place.'" 480 U.S. at 726 (plurality opinion) (citation omitted and emphasis added); *see also id.* (search must not be "'*excessively* intrusive'" in light of nature of misconduct) (citation omitted and emphasis added). Hypothesizing "less intrusive means" is a far cry from examining whether a search actually conducted is reasonably related to the circumstances justifying the search.

As the dissent below observed, "[r]ather than evaluate whether the search '*actually* conducted'" was reasonable, "as *O'Connor* requires us to do, 480 U.S. at 726, . . . (emphasis added), the panel looks at what the police department *could* have done." App. 145 (parallel citation omitted). The panel erred, for "the real question is not what 'could have been achieved,' but whether the Fourth Amendment *requires* such steps." *Illinois v. Lafayette*, 462 U.S. at 647. The Court should explain that the Ninth Circuit opinion in this case embodies precisely the kind of less-intrusive means analysis that courts must *not* employ under the Fourth Amendment.

B. Properly Assessed, The Department's Review Of The Text Message Transcripts Was Reasonable.

"In the case of searches conducted by a public employer, [the Court] must balance the invasion of the employees' legitimate expectations of privacy against the government's need for supervision, control, and the efficient operation of the workplace." *O'Connor*, 480 U.S. at 719-720 (plurality opinion). Even if there exists a reasonable expectation of privacy, *O'Connor* teaches that a warrantless search by a public employer is legal if it is work-related and reasonable. *Id.* at 725-726 (plurality opinion); *id.* at 732 (Scalia, J., concurring in the judgment). To be legal, "both the inception and the scope of the intrusion must be reasonable." *Id.* at 726 (plurality opinion). A public employer's search is justified at its inception when the employer reasonably needs to conduct a search for a noninvestigatory work-related purpose or reasonably suspects the employee has committed work-related misconduct. *Id.* (plurality opinion). Under these standards, the Department's review of the pager transcripts was reasonable both in its inception and in its scope.

The lower courts properly agreed that the Department's review was justified at the inception because, as the jury found, it was intended to ensure that the existing monthly character limit on the pagers was sufficient. And the district court properly determined that the Department's review was reasonable in scope if the purpose was, as the jury found,

to determine the efficacy of the character limit. The Ninth Circuit, however, erroneously employed its "less intrusive methods" test in determining that the scope of the search was not reasonable and that *plaintiffs'* motion for summary judgment therefore should have been granted.

Because, as we explain below, the review was also reasonable at its inception and in its scope even if conducted to investigate workplace misconduct, *Ontario defendants'* motion for summary judgment should have been granted. The lower courts erroneously determined—again by mistakenly exalting Lieutenant Duke's accommodation—that the search would not have been justified if aimed at investigating possible misconduct. But because investigating possible misuse of the pager would have been a legitimate justification for the search, it follows that there was no *material* issue of fact as to Chief Scharf's purpose in ordering the pager transcripts. Under *either* purpose that the district court's summary judgment order identified—to investigate misconduct *or* to determine the character limit's efficacy —the transcript review was reasonable. And because the scope of the search was also reasonable, for either purpose, summary judgment should have been granted in favor of Ontario defendants.

1. The transcript review was reasonable if undertaken, as the jury found, for the non-investigatory purpose of determining the efficacy of the monthly character limit on the Department pagers.

In light of the Department's legitimate, strong interests in operating as efficiently as possible, the lower courts properly agreed that the Department's review of transcripts was justified at the inception if Chief Scharf's purpose was to investigate the efficacy of the monthly character limit on the pagers. As the head of the police department, Chief Scharf was responding to information that Lieutenant Duke—the officer in charge of administrative and fiscal matters—was tired of spending excess time and energy as a "bill collector." *See* S.E.R. 261; J.A. 61; *see also* S.E.R. 113 (Chief Scharf recalls Lieutenant Duke complaining that there were "a lot of the overages" and that some officers were "killing trees in the overages"). It was, in Lieutenant Duke's words, "very labor intensive to get people to pay for overages." J.A. 85.

Therefore, as the district court determined, the Department could legitimately review the transcripts "to see, in fact, how many characters were being used for business reasons" in order to "make sure that some of the overages for which the officers were paying was not work-related[.]" App. 100. "If more than the monthly character limits were so used, the department would increase the character limits so

that the officers would not have to pay for any of their work related duties out of their own pocket." *Id.* The Ninth Circuit agreed that this was a "legitimate work-related rationale" for the Department to review the transcripts. App. 34.

As to whether the search was reasonable in scope, the district court examined the Department's transcript review and concluded it was reasonable. App. 101-102. The Ninth Circuit, however, disagreed, erroneously employing its "less intrusive methods" test to determine that the search was not reasonable and therefore violated the Fourth Amendment. App. 35-36.

In contrast to the Ninth Circuit panel's hypotheses of "less intrusive methods," the dissenting opinion identified the proper standard for determining whether a public employer's workplace search is reasonable in scope: whether it is "'reasonably related to the objectives of the search and not excessively intrusive in light of [its purpose.]'" App. 145 (quoting *O'Connor*, 480 U.S. at 726 (plurality opinion)); *accord*, *Leventhal*, 266 F.3d at 73. Under this standard, the district court's analysis of the actual search conducted by the Department soundly demonstrated the reasonableness of the search.

Specifically, the district court explained that the scope of the search was reasonable in light of the purpose of determining whether the monthly character limit was causing officers to bear "hidden work-related costs[.]" App. 101. The court carefully

considered the scope of the Department's actual review of the transcripts. "[T]he department limited its audit to just those officers that had exceeded the monthly character limits for the time in question, which would be understandable if the reason for the audit was to make sure officers who have exceeded the character limits were not paying hidden work-related costs . . . ." *Id.* The court determined that "the only way to accurately and definitively determine whether such hidden costs were being imposed by the monthly character limits that were in place was by looking at the actual text-messages used by the officers who exceeded the character limits." App. 102. Merely interviewing Sergeant Quon would not have sufficed because reviewing the transcripts would still be necessary to "confirm that [his] recollection was accurate," and looking at just the telephone numbers would "not provide any definitive answer as to *what* those individuals were text-messaging each other about." *Id.* The court's findings were supported by, among other things, Sergeant McMahon's affidavit explaining that the only way for internal affairs to determine the amount of personal text messaging while on-duty was to review actual, redacted transcripts, and his report explaining that process. J.A. 142-143; *see also* J.A. 142 (when asked by Department investigator, Sergeant Quon "indicated that he could not state how much time he spent on the pager during work hours"). In short, it was reasonable for the Department to review the actual pager transcripts.

Because the transcript review was reasonable if undertaken for the purpose of determining the efficacy of the monthly character limit, the district court properly denied plaintiffs' summary judgment motion. Therefore, at a minimum, the Ninth Circuit should have affirmed the judgment in favor of Ontario defendants on this ground.

2. The transcript review was also reasonable if undertaken as an investigatory search for possible employee misconduct in using the Department pagers.

As Ontario defendants argued in the Ninth Circuit, the transcript review was reasonable even if Chief Scharf's purpose was to investigate misconduct. Since, as explained below, the search was reasonable regardless of which was the motivating purpose (investigatory or non-investigatory), the issue should never have gone to the jury. It was Ontario defendants' motion for summary judgment that should have been granted, and the judgment in their favor should have been affirmed on this alternative ground.

Under *O'Connor*, even if there exists a reasonable expectation of privacy, a warrantless search by a public employer is lawful if it is undertaken to investigate work-related misconduct and is reasonable under the circumstances. 480 U.S. at 724-725 (plurality opinion); *id.* at 732 (Scalia, J., concurring in

the judgment). It is perfectly reasonable for a police chief to investigate whether officers are, in Chief Scharf's words, "wasting a lot of City time" by texting about non-work-related matters while on duty. J.A. 88.

Lieutenant Duke's policy, even if it accommodated some personal use of the pagers, would not make it any less reasonable to investigate possible misuse of the pagers. Permitting moderate personal use of the pagers did not condone excessive personal use. If an officer is spending an inordinate amount of time sending and receiving personal messages and not doing his job, that is misconduct regardless of whether there is a policy allowing *some* personal use. In fact, in dangerous professions that directly affect the public's safety, personal text messaging while on duty can have deadly consequences.[6]

Lieutenant Duke never suggested he approved personal use of the pagers *while on duty*. He simply allowed officers to pay for overages. While this arguably allowed for some pager use for personal matters, it said nothing about *on-duty* personal use. The

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[6] *See* Robert J. Lopez, Rich Connell, and Steve Hymon, *Train Engineer Sent Text Message Just Before Crash*, October 2, 2008, http://articles.latimes.com/2008/oct/02/local/me-crash2 ("A Metrolink engineer sent a text message from his cellphone 22 seconds before he collided with an oncoming freight train in an accident that killed 25 people last month, according to preliminary information released Wednesday by federal authorities.").

Department's official policy, of which Sergeant Quon signed an acknowledgment (App. 156), prohibited personal use but allowed some light personal communications. App. 152, ¶ III.A. A reasonable officer would know that it is misconduct to engage in personal text messaging while on duty, other than the "light personal communications"—e.g., "personal greetings or personal meeting arrangements"—allowed by the policy. App. 153, ¶ III.F.

Thus, allowing *some* personal use of the pagers did not eliminate the Department's legitimate need to investigate *excessive* on-duty personal use. For activities such as this, a little may be acceptable, but too much becomes misconduct. For example, while some absenteeism is expected, excessive absenteeism is grounds for discharge. *See, e.g., Rivera v. Nat'l R.R. Passenger Corp.*, 331 F.3d 1074, 1079 (9th Cir. 2003) (Amtrak employee terminated for excessive absenteeism).

Accommodating limited personal use of employer resources to attend to personal matters, such as making appointments, may well allow an employer to operate more effectively and efficiently and provide some measure of convenience to employees. But such accommodations should not be interpreted as a carte blanche for irresponsible public employees to flagrantly exploit public resources while on duty. That, however, is what the Ninth Circuit's ruling encourages. Employers, in turn, are encouraged to curtail any accommodations in electronic communications—even to employees who behave reasonably—

lest the employers end up losing their ability to maintain their agencies' efficiency and safety. *See* William J. Stuntz, *Implicit Bargains, Government Power, and the Fourth Amendment*, 44 Stan. L. Rev. 553, 579 (1992) (noting that "if the law were to forbid these ordinary work-related entries, employers would have a substantial incentive to restructure the work environment to recover their ability to retrieve information").

Apart from these efficiency concerns, the lower courts did not properly balance the Department's—as well as the public's—very strong interests in the conduct of their police officers against whatever minimal expectation of privacy that Lieutenant Duke's payment arrangement could have fostered. *See Dible*, 515 F.3d at 928 (city has especially strong interest in maintaining effective and efficient police department). The Department would have been fully justified in reviewing Sergeant Quon's pager transcripts to discover the extent to which he was sending personal text messages on the public's time. After all, Sergeant Quon had already exceeded the monthly character limit a number of times and, during the month under review, he exceeded the 25,000 character limit by more than 15,000 characters. J.A. 34, 50.

Not only was a search for misconduct justified at the inception, but the actual search was reasonable in scope whether undertaken for this purpose or to determine the efficacy of the character limit, for the same reasons identified by the district court and

discussed above. *See supra* Argument III.B.1; App. 101-102; J.A. 142-143. Ontario defendants were therefore entitled to summary judgment in their favor.

* * *

The Department was acting in its capacity as Sergeant Quon's employer, not in the capacity of the sovereign investigating a citizen. As *O'Connor* explains, "public employers have a direct and overriding interest in ensuring that the work of the agency is conducted in a proper and efficient manner." 480 U.S. at 724 (plurality opinion). Put simply, "the relevant question is whether th[e] intrusion upon privacy is one that a reasonable employer might engage in[.]" *Vernonia*, 515 U.S. at 665 (citing *O'Connor*). Here, the answer is yes. The Ninth Circuit ruling therefore should be reversed with an order to affirm the district court judgment.

IV. THE INDIVIDUALS WHO SENT TEXT MESSAGES TO SERGEANT QUON'S DEPARTMENT-ISSUED PAGER HAD NO REASONABLE EXPECTATION OF PRIVACY IN THOSE MESSAGES, AND THEREFORE WERE NOT ENTITLED TO FOURTH AMENDMENT PROTECTION WHEN THE DEPARTMENT, AS SERGEANT QUON'S EMPLOYER, REVIEWED THE MESSAGES.

The Ninth Circuit's sweeping holding that plaintiffs April Florio, Jerilyn Quon, and Sergeant Trujillo

had objectively reasonable expectations of privacy under the Fourth Amendment is mistaken and further damages government employers' ability to effectively use and monitor communications equipment—particularly where, as here, the public employer is a law enforcement agency. The court erroneously concluded that these other three plaintiffs legitimately expected that their text messages with Sergeant Quon would be free from Department review even though Sergeant Quon, a police officer, was not using a private pager, but rather a police department pager.

Here, even more than in its discussion of Sergeant Quon's Fourth Amendment claim, the Ninth Circuit's opinion is untethered to the specific facts of the case. The court began by asserting that "[t]he extent to which the Fourth Amendment provides protection for the contents of electronic communications in the Internet age is an open question." App. 23. Next the court framed the issue as if these plaintiffs had exchanged text messages with an individual citizen on his personal pager and as if he had his own account with Arch Wireless. *See* App. 24 ("Do users of text messaging services such as those provided by Arch Wireless have a reasonable expectation of privacy in their text messages stored on the service provider's network?"). In reality, and ignored by the court, these plaintiffs knowingly had exchanged the text messages with a police officer on his *Department-issued* pager.

In fact, the Ninth Circuit opinion fails to account for the fact that the other plaintiffs were fully aware

that they were sending messages to Sergeant Quon's Department-issued pager: Sergeant Trujillo was a fellow SWAT officer and also using a Department-issued pager himself (*see* App. 2, 5); police dispatcher April Florio and Sergeant Quon's wife, Jerilyn Quon, were using their own personal pagers but knew that Sergeant Quon's pager was issued by the Department. S.E.R. 303-304, 307. But the Ninth Circuit ignored these undisputed facts, treating all three essentially as if they were third parties sending text messages to Sergeant Quon's private pager.

As the United States pointed out in its amicus brief in the Ninth Circuit, "[t]hough the panel stated that it did 'not endorse a monolithic view of text message users' reasonable expectation of privacy, as this is necessarily a context-sensitive inquiry,' the panel discussed few contextual facts other than whether Quon 'voluntarily permitted the Department to review his text messages.'" App. 164-165 (quoting the Ninth Circuit opinion at App. 28). And with respect to the other plaintiffs, as opposed to Sergeant Quon, the Ninth Circuit did not even rely on Lieutenant Duke's bill-paying arrangement (App. 27 n.6), and the opinion is silent as to their knowledge of it.

Untethered to any contextual facts, the Ninth Circuit analogized text messages to telephone calls, regular mail, and e-mail, broadly holding that the other three plaintiffs had a reasonable expectation of privacy in the content of messages they exchanged with Sergeant Quon such that either their consent or

his consent was required for the Department to review the messages. *See* App. 24-28. But whether users of text messaging *generally* have a reasonable expectation of privacy in the content of text messages is not the issue here. Neither the Ninth Circuit's reasoning nor the authorities it cited address a third party's expectation of privacy in communications exchanged with a person on that person's *workplace* equipment—here a police department's equipment. In fact, the cases cited by the Ninth Circuit involving telephone calls, letters, emails, and computer usage did not address government employers' work-related searches at all; they addressed law enforcement searches. *See id.*

Whatever amount of privacy one might reasonably expect vis-à-vis the government acting in its capacity as sovereign in a text message sent from one privately-owned pager to another—and, again, it bears noting that in the Ninth Circuit, the United States argued there was *none* (App. 177-180)—it is not objectively reasonable to expect privacy in text messages sent to someone else's workplace pager, let alone a police officer's department-issued pager. To have such an expectation, the sender would have to believe the recipient's employer does *not* have a no-privacy policy in place as to that employer's electronic communications equipment. That is *un*reasonable.

As we have demonstrated, public and private employers alike typically have in place policies establishing that employees should have no expectation of privacy in electronic communications and other

computer usage on employer-owned equipment. *See supra* Argument II.B.; *see also Kozinets, supra*, 25 Comm. Law. at 23. And this is common knowledge: "For desk jockeys everywhere, it has become as routine as a tour of the office-supply closet: the consent form attesting that you understand and accept that any e-mails you write, Internet sites you visit or business you conduct on your employer's computer network are subject to inspection." Jennifer Ordoñez, *They Can't Hide Their Pryin' Eyes – An Appeals Court Ruling Makes It More Difficult For Employers To Sniff Around In Workers' Electronic Communications*, Newsweek, July 14, 2008, at 22; *see also Muick*, 280 F.3d at 743; *TBG Ins. Servs. Corp.*, 96 Cal. App. 4th at 451 (noting that three quarters of firms have such policies).

The Ninth Circuit, however, ignored the prevalence of such policies. In fact, it even ignored the explicit policy in this case, concluding that "[h]ad Jeff Quon voluntarily permitted the Department to review his text messages, the remaining Appellants would have no claims." App. 28. But Sergeant Quon effectively *did* consent, as he signed the City's written policy as a City employee.[7]

As the United States aptly pointed out, "[n]ot only do senders lack knowledge of what privacy policy

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[7] Again, the Ninth Circuit relied on Lieutenant Duke's informal policy only when it addressed whether *Sergeant Quon* had a reasonable expectation of privacy. App. 27 n.6.

applies to a recipient, but few actions demonstrate an expectation of privacy less than transmission of information to the work account of a public employee charged with enforcing the law." App. 179. As a matter of common sense, senders should understand that communications with law enforcement agencies are often recorded or monitored because they often involve reporting crimes or emergencies.

In short, the Ninth Circuit failed to consider whether the senders' expectation of privacy is objectively reasonable for Fourth Amendment purposes —one that society is prepared to recognize as reasonable, *Smith v. Maryland,* 442 U.S. at 740—in light of these prevailing circumstances. Remarkably, the court concluded that plaintiffs "prevail *as a matter of law*." App. 40 (emphasis added). This startling extension of Fourth Amendment protection hinders any government employer's ability to monitor even its *own* employees' electronic communications, which inevitably will include messages sent from third-party senders. The Ninth Circuit opinion thus further hamstrings public employers' ability to prevent abuse and protect the integrity of workplace communications, providing another reason to reverse the Ninth Circuit's ruling and order affirmance of the district court judgment.

CONCLUSION

The Ninth Circuit's judgment should be reversed, with directions to affirm the district court's judgment in favor of petitioners City of Ontario, California, Ontario Police Department, and Lloyd Scharf for the reasons stated above.

Respectfully submitted,

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RESPONDENT'S BRIEF

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In The
Supreme Court of the United States

CITY OF ONTARIO,
ONTARIO POLICE DEPARTMENT,
and LLOYD SCHARF,

Petitioners,

v.

JEFF QUON, JERILYN QUON,
APRIL FLORIO and STEVE TRUJILLO,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTIONS PRESENTED

While individuals do not lose Fourth Amendment rights merely because they work for the government, some expectations of privacy held by government employees may be unreasonable due to the "operational realities of the workplace." *O'Connor v. Ortega*, 480 U.S. 709, 717 (1987) (plurality opinion). Even if there exists a reasonable expectation of privacy, a warrantless search by a government employer – for non-investigatory work-related purposes or for investigations of work-related misconduct – is permissible if reasonable under the circumstances. *Id.* at 725-26 (plurality opinion). The questions presented are:

1. Whether a SWAT team member has a reasonable expectation of privacy in text-messages transmitted on his SWAT pager, where the police department has no formal no-privacy policy pertaining to text-message transmissions and the operational realities of the police department are such that SWAT team members are explicitly told their messages would remain private if they paid any additional overage charges.

2. Whether the Ninth Circuit contravened this Court's Fourth Amendment precedents and created a circuit conflict by analyzing whether the police department could have used "less intrusive methods" of reviewing text-messages transmitted by a SWAT team member on his SWAT pager.

QUESTIONS PRESENTED – Continued

3. Whether individuals who send text-messages to a SWAT team member's SWAT pager have a reasonable expectation that their messages will be free from review by the recipient's government employer.

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STATEMENT OF THE CASE

Ontario Police Department SWAT Sergeant Jeff Quon used his Department-issued text-messaging pager to exchange private communications after being told that his messages would not be reviewed as long as he paid any overage charges. Quon paid the overage charges, but the Department still reviewed his messages.

In 2001, the City of Ontario began issuing text-message pagers to members of its Police Department's SWAT team. At the time, the City had no explicit written policy governing the use of the pagers. Instead, Lieutenant Steven Duke – a Department Commander and the person in charge of the use and provision of the Department's electronic equipment – advised supervisory officers, including Sergeant Quon, that the City's existing *general* computer policy, which

did not mention pagers, would govern the usage of the pagers. Although the existing computer policy stated that the City could access employees' work computers and audit their emails, the City never amended the policy to expressly include pagers and never issued any notice to any of its rank-and-file employees of Lieutenant Duke's announcement.

At the same time, Lieutenant Duke – the only individual to announce that the computer policy governed the use of the pagers – initiated another policy of agreeing *not* to audit the use of the pagers so long as the personnel in question paid the Department for the overage charge. Only when the officer in question disputed the overages, either claiming that the use was work-related or otherwise, did Lieutenant Duke make clear that he would endeavor to audit the contents of the messages sent and received on the pager.

Lieutenant Duke's policy became the Department's practice. In fact, various officers, including Sergeant Quon, exceeded the monthly character limit on several occasions. Each time, the officers, including Quon, paid the overage charge and the City honored the officer's privacy.

However, in August 2002, Lieutenant Duke grew tired of collecting the overage charges and notified Chief of Police Lloyd Scharf. Notwithstanding the policy and practice of maintaining privacy, Chief Scharf and Lieutenant Duke decided to audit the text-messages of the two officers who had exceeded

the character limit that month. Sergeant Quon happened to be one of those officers. Ignoring the clear expectation of privacy that was established, Lieutenant Duke ordered the text-messages from the service provider, Arch Wireless, and reviewed them. After discovering this, Sergeant Quon, along with three other individuals he exchanged text-messages with, filed suit alleging the City and Chief Scharf violated their Fourth Amendment rights.

A. The City Of Ontario's "Computer Usage" Policy And Its Contract With Arch Wireless.

At no time did the City of Ontario have an explicit policy governing the use of text-message pagers. *See* App. 4, 47.

Instead, the City maintained a general "Computer Usage, Internet and E-mail Policy," which states that "[t]he use of City-owned computers and all associated equipment, software, programs, networks, Internet, e-mail and other systems operating on these computers is limited to City of Ontario related business. The use of these tools for personal benefit is a significant violation of City of Ontario Policy." *See* Excerpts of Record (hereinafter "E.R.") 866-67. The policy also provides:

> C. Access to all sites on the Internet is recorded and will be periodically reviewed by the City. The City of Ontario reserves the right to monitor and log all network

activity including e-mail and Internet use, with or without notice. Users should have no expectation of privacy or confidentiality when using these resources.

D. Access to the Internet and the e-mail system is **not** confidential; and information produced either in hard copy or in electronic form is considered City property. As such, these systems should not be used for personal or confidential communications. Deletion of e-mail or other electronic information may not fully delete the information from the system.

E. The use of inappropriate, derogatory, obscene, suggestive, defamatory, or harassing language in the e-mail system will not be tolerated.

E.R. 866-67.

Although the policy states that "[t]he use of these tools for personal benefit is a significant violation," *id.*, the policy does expressly allow for personal use: "[I]ncidental and occasional personal use of the email system is permitted if limited to 'light' personal communications," which "may consist of personal greetings or personal meeting arrangements." App. 153, ¶ III(F).

Furthermore, the policy explains that "[a]ccess to the Internet and the e-mail system is not confidential" and that the "City of Ontario reserves the right to monitor and log all network activity including

e-mail and Internet use, with or without notice." *Id.* at 152-53.

As part of its provision of *computer* desktop equipment to its personnel, the Ontario Police Department had all of its employees review and sign a written statement of the Department's policy concerning use of this equipment. *Id.* at 47-48. Sergeant Jeff Quon received a copy of this written policy and signed the form acknowledging he had reviewed and understood the policy on March 18, 2000, almost a year before the City ever obtained the text-message pagers. *Id.*

In 2001, the City of Ontario contracted with Arch Wireless Operating Company, Inc., to provide wireless text-messaging services for the City of Ontario Police Department's SWAT team. Pet. Br. 5. The decision to supply SWAT members with text-message pagers stemmed from the fact that the SWAT members were required to be on call "24/7" and the City's "refusal to pay overtime or stand-by pay to officers who must be available for SWAT call-outs." App. 126-27; *see also* Joint Appendix (hereinafter "J.A.") 35.

The City received twenty two-way alphanumeric pagers, which it distributed to its SWAT employees, including Sergeant Quon and Sergeant Steve Trujillo. Pet. Br. 5. The text-messages, sent and received through Arch Wireless' pagers, were not stored or otherwise maintained or kept by the City of Ontario. App. 46. According to Steven Niekamp, Director of Information Technology for Arch Wireless:

A text message originating from an Arch Wireless two-way alphanumeric text-messaging pager is sent to another two-way text-messaging pager as follows: The message leaves the originating pager via a radio frequency transmission. That transmission is received by any one of many receiving stations, which are owned by Arch Wireless. Depending on the location of the receiving station, the message is then entered into the Arch Wireless computer network either by wire transmission or via satellite by another radio frequency transmission. Once in the Arch Wireless computer network, the message is sent to the Arch Wireless computer server. Once in the server, a copy of the message is archived. The message is also stored in the server system, for a period of up to 72 hours, until the recipient pager is ready to receive delivery of the text message. The recipient pager is ready to receive delivery of a message when it is both activated and located in an Arch Wireless service area. Once the recipient pager is able to receive delivery of the text message, the Arch Wireless server retrieves the stored message and sends it, via wire or radio frequency transmission, to the transmitting station closest to the recipient pager. The transmitting stations are owned by Arch Wireless. The message is then sent from the transmitting station, via a radio frequency transmission,

> to the recipient pager where it can be read by the user of the recipient pager.

Id. at 3-4.

B. The City's Policy Maintaining Officer's Privacy And Its Impulsive Decision To Violate That Policy.

Two years later, in April 2002, Sergeant Quon attended a meeting during which Lieutenant Duke, a Commander with the Ontario Police Department's Administration Bureau, informed all present that pager messages "were considered e-mail, and that those messages would fall under the City's policy as public information and eligible for auditing." App. 5-6. At the time, Lieutenant Duke was the person in charge of the use and provision of the Department's electronic equipment and was responsible for maintaining the Arch Wireless contract. *Id.* Quon "vaguely recalled attending" the meeting, but did not recall Lieutenant Duke stating that use of the pagers was governed by the City's general computer policy. *Id.* This statement was later recorded in the minutes from the staff meeting and distributed to supervisory staff. *Id.* at 48. However, the City never amended its computer policy to expressly include text-message pagers and never advised anyone other than supervisory staff of Lieutenant Duke's policy statement. *Id.* at 4.

In addition, as the district court found, "Lieutenant Duke's representation that the Department could

audit the pagers was not entirely accurate." *Id.* at 49. The Department's supervisory staff itself did not have the ability to review the contents of the text-messages sent or received by the pagers issued to its employees. *Id.* Supervisory staff could not access what transpired over the pagers from their own computers, nor could they log onto Arch Wireless' network from their computers at work to do the same. *Id.* Instead, to review the contents of the text-message sent or received from one of the city-owned pagers, supervisory staff had to contact an Arch Wireless representative and request for them to generate a copy of the transcripts of those messages. *Id.*

More importantly, the district court found that the Department had a policy of agreeing *not* to audit the use of the pagers whenever overages existed so long as the personnel in question paid the Department for the overage: "Only when the personnel in question disputed the overages – either claiming that the use was work-related or otherwise – did Lieutenant Duke make it clear that he would endeavor to audit the contents of the messages sent and received on the pager." App. 49.

Lieutenant Duke, who was the only individual to ever inform supervisors that the City's computer policy governed the use of the text-message pagers, related the new policy regarding the conditions under which an audit of a pager would take place for overages to Sergeant Quon. App. 50. Within the first or second billing cycle after the pager was issued to Quon, Lieutenant Duke approached Quon because he

had exceeded his maximum number of allotted characters. *Id.* During this conversation, Lieutenant Duke told Quon that the text-messages sent over the City-owned pager "were considered e-mail and could be audited," but went on to say "that it was not his intent to audit employee's text messages to see if the overage is due to work related transmissions." *Id.* Instead, Quon "could reimburse the City for the overage so he would not have to audit the transmission and see how many messages were non-work related." *Id.*

At deposition, Lieutenant Duke further explained the policy:

> [W]hat I told Quon was that he had to pay for his overage, that I did not want to determine if the overage was personal or business unless they wanted me to, because if they said, "It's all business, I'm not paying for it," then I would do an audit to confirm that. And I didn't want to get into the bill collecting thing, so he needed to pay for his personal messages so we didn't – pay for the overage so we didn't do the audit.

Id. at 50-51. In other words, "pay for the overage so [the City] didn't [have to] do the audit." *Id.* at 51.

Accordingly, Quon's understanding of the Department's policy was "if you don't want us to read [your messages], pay the overage fee." App. 128; *see also* J.A. 35 ("In exchange [for receiving the pagers], the S.W.A.T. officers agreed to not put in for stand-by pay or other overtime compensable under FLSA and city

rules" and as a result there "was *never* a discussion concerning restrictions on the use of the pagers."). Thus, "at no time was [Quon] told the pager could not be used for personal messages or that text transmissions would be retrieved from electronic storage." J.A. 35. Instead, it had been the "City's unwritten practice" to notify officers of overages and require them to write a check for the difference. *Id.* As a result, the "use of the pager was for both, city and personal communications with any overages to be brought to the officer's attention for repayment." *Id.*

The practice at the Department was consistent with Lieutenant Duke's statement of the policy and Sergeant Quon's understanding of the policy. App. 8, 50. Sergeant Quon exceeded the monthly character limit "three or four times" and paid the City for the overages. *Id.* Each time, "Lieutenant Duke would come and tell [Quon] that [he] owed X amount of dollars because [he] went over [his] allotted characters," and Quon would pay the City for the overages. *Id.* Pursuant to the policy, the City did not review any of Quon's messages on any of those occasions. *Id.*

In August 2002, Sergeant Quon and another officer again exceeded the 25,000-character limit. App. 8. Inexplicably, Lieutenant Duke became upset and indicated at a command staff meeting that he was "tired of being a bill collector with guys going over the allotted amount of characters on their text pagers." *Id.* In response, Chief of Police Lloyd Scharf ordered Lieutenant Duke to "request the transcripts of those pagers for auditing purposes." *Id.* Chief Scharf asked

Lieutenant Duke "to determine if the messages were exclusively work related, thereby requiring an increase in the number of characters officers were permitted, which had occurred in the past, or if they were using the pagers for personal matters. *Id.* One of the officers whose transcripts [he] requested was plaintiff Jeff Quon." *Id.*

When ordering the transcripts, Chief Scharf was aware of Lieutenant Duke's policy of allowing the use of pagers for personal matters when he ordered him to do the audit in question, and he was also aware that the two officers whose pager transcripts he was ordering to be audited had already paid for their overages for the period under review. *Id.* at 52. Lieutenant Duke acknowledged that the Department unilaterally and without prior notice simply "stopped the practice" of maintaining officer's privacy. *Id.* at 51.

Furthermore, Chief Scharf admitted at his deposition that he was not concerned in the slightest when pressed whether such an audit may uncover personal information about the officers in light of Lieutenant Duke's policy that was in effect during the time the transmissions were made allowing officers to use the pagers for personal, non-worked related purposes. *Id.* at 53. Chief Scharf indicated that he gave no consideration to Quon's privacy expectations. *Id.*

At the conclusion of the meeting, Chief Scharf ordered Lieutenant Duke to obtain the transcripts for the text-messages sent on Sergeant Quon's and the other officer's pagers for the period of August to

September 2002, and review the contents of the pager transmissions. *Id.* at 119. Chief Scharf ordered the review, as a jury would later find, to "determine the efficacy of the existing character limits to ensure that officers were not being required to pay for work-related expenses." *Id.*

The Department's contact person requested from Arch Wireless the transcripts for the two pagers. *Id.* at 54. The Arch Wireless representative confirmed only that the pagers were owned by the City and that the request for transcripts came from the designated contact person with the City. *Id.* After satisfying itself of these two points, Arch Wireless provided the transcripts of the text-message communications sent and received by the pagers during the time in question. *Id.*

Upon review, the City determined that Quon sent text-messages both on and off duty, with many of the messages containing private content, some of which was sexually explicit. *Id.* at 54-55. Messages were exchanged between Sergeant Quon and his wife Jerilyn Quon, who he was separated from at the time. *Id.* Other messages were exchanged with his girlfriend, April Florio, and his fellow SWAT member, Sergeant Steve Trujillo. *Id.* at 55.

C. The District Court Proceedings.

After the City's actions were discovered, Sergeant Quon, Sergeant Trujillo, April Florio and Jerilyn Quon (hereinafter collectively referred to as "plaintiffs" or

"respondents") filed suit in the District Court, for the Central District of California. Their suit was brought against the City of Ontario, its Police Department, Chief of Police Lloyd Scharf, and Sergeant Debbie Glenn (hereinafter collectively referred to as "Ontario defendants" or "petitioners"), under 42 U.S.C. § 1983, alleging Fourth Amendment violations based upon the Ontario defendants' review of plaintiffs' text-messages. Plaintiffs also named Arch Wireless Operating Company, Inc. as a defendant, and alleged that its disclosure of the text-messages violated the Stored Communications Act (hereinafter "SCA"), 18 U.S.C. § 2701 et seq.

After numerous rounds of cross-motions for summary judgment, the district court first determined that Sergeant Quon had a reasonable expectation of privacy in his text-messages under the "operational realities of the workplace" standard established in *O'Connor v. Ortega*, 480 U.S. 709, 717 (1987). The district court found that

> [t]his 'operational reality,' however, was fundamentally transformed by Lieutenant Duke's conscious decision not to enforce th[e general computer] policy. . . . Lieutenant Duke made it clear to the staff, and to Quon in particular, that he would *not* audit their pagers so long as they agreed to pay for any overages. Given that Lieutenant Duke was the one in charge of administering the use of the city-owned pagers, his statements carry a great deal of weight. Indeed, before the events that transpired in this case the

> department did not audit any employee's use of the pager for the eight months the pagers had been in use. This was true even when overages were involved. Lieutenant Duke in effect turned a blind eye to whatever purpose an employee used the pager, thereby vitiating the department's policy of any force or substance. By doing so, Lieutenant Duke effectively provided employees a reasonable basis to expect privacy in the contents of the text messages they received or sent over their pagers; the only qualifier to guaranteeing that the messages remain private was that they pay for any overages.

App. 90-91.

The district court next considered whether the review of the text-messages was reasonable under the circumstances, ultimately determining that a genuine issue of material fact existed as to "the actual *purpose* or *objective* Chief Scharf sought to achieve" in ordering the search. *Id.* at 97. The court held that if the search was meant to ferret out misconduct by determining whether the officers in questions were "playing games" with their pagers or otherwise "wasting a lot of City time conversing with someone about non-related work issues," the search would *not* have been justified at its inception. *Id.* at 98. The court's finding was predicated upon the fact that the officers' pagers were searched during the period of time when Lieutenant Duke's informal, but express policy of not auditing the pagers was in effect:

> Given this policy, it cannot be said that determining whether the officers went over the character limits during this period because they used the pagers for personal matters . . . was 'misconduct'; it was the very conduct Lieutenant Duke's informal policy allowed, condoned, and even encouraged. For a search to be considered justified at the inception when it is meant to discover workplace misconduct, there must exist 'reasonable grounds' to suspect that such evidence of misconduct would be uncovered by the search in question. In light of Lieutenant Duke's policy, search would not have revealed misconduct; rather, it would have uncovered conduct permitted by Lieutenant Duke to occur.

App. 98-99.

Conversely, the other possible purpose of the search – to determine the utility or efficacy of the existing monthly character limits – would have rendered the search justified at its inception. *Id.* at 99. The district court held that evidence existed demonstrating that the audit was conducted to address the City's concern that officers were paying too much in overages because the character limits were not high enough to capture all the work-related usage of the pagers. *Id.* at 100. The court held that if this was the purpose of the search, the search would be justified at its inception and reasonable in scope. *Id.* at 101. The court denied the parties' cross-motions for

summary judgment and the matter was presented to a jury.[1] *Id.* at 103.

A jury found that Chief Scharf's purpose in ordering the review of the transcripts was to determine the efficacy of the existing character limits to ensure that officers were not being required to pay for work-related expenses. *Id.* at 119. As a result, the district court found that no Fourth Amendment violation had occurred, and entered judgment in favor of the Ontario defendants.

D. The Plaintiffs' Appeal.

Plaintiffs timely appealed, challenging the district court's ruling that the search of the transcripts was reasonable in light of the jury's determination that the purpose of the search was for noninvestigatory purposes. *Id.* at 21. Plaintiffs agreed with the district court's conclusion that they possessed a reasonable expectation of privacy in the text-messages, but argued that the issue regarding Chief Scharf's intent in authorizing the search never should have gone to trial because the search was unreasonable as a matter of law. *Id.*

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[1] The district court also granted Arch Wireless' motion for summary judgment, holding that Arch Wireless did not violate the SCA. The district court found that Arch Wireless was a "remote computing service" under 18 U.S.C. § 2702(a), and as a result, the disclosure of the electronic text-messages to a "subscriber," the City, was lawful. App. 58-84.

The Ninth Circuit reversed, holding that plaintiffs were entitled to summary judgment in their favor and against the Ontario defendants. Applying the *O'Connor* "operational realities of the workplace" standard, 480 U.S. at 717, the Ninth Circuit agreed with the district court that the Department's policy that the text-messages would not be audited if the officers paid the overages rendered Quon's expectation of privacy in those messages reasonable. *Id.* at 29. The Ninth Circuit, like the district court, considered all of the record evidence and found that Lieutenant Duke's express and specific policy was an important consideration and crucial to Sergeant Quon's expectation of privacy.

The Ninth Circuit also held that the other three plaintiffs had a reasonable expectation of privacy in the messages they sent to Sergeant Quon. This conclusion was reached after reviewing its own jurisprudence relative to e-mail messages, regular mail and telephone communications, and finding no meaningful difference. *Id.* at 23-28.

In evaluating the reasonableness of the search under *O'Connor*, and in light of the jury's special verdict regarding the purpose of the search, the Ninth Circuit found that the search was reasonable at its inception but unreasonable in scope. *Id.* at 34. Applying the *O'Connor* framework, the court held that the search was reasonable "at its inception" because the Department conducted the search for the work-related purpose of ensuring that "officers were not being required to pay for work-related expenses," as

the jury had found. *Id.* In evaluating the scope of the search, the Ninth Circuit examined whether the measures adopted were "reasonably related to the objectives of the search and not excessively intrusive in light of . . . the nature of the [misconduct]." *Id.* at 34-35. However, because "the Department opted to review the contents of all the messages, work-related and personal, without the consent of Quon," the search "was excessively intrusive in light of the noninvestigatory object of the search," *Id.* at 34-36; *see also id.* at 133-34. The holding was based on the court's "conclusion that Quon's 'reasonable expectation of privacy in those messages' was not outweighed by the government's interest – again, as found by the jury – in auditing the messages." *Id.* at 35-36; *see also id.* at 134.

In its opinion, the Ninth Circuit did not utilize a "less intrusive means" test, but rather discussed other ways the City could have verified the efficacy of the 25,000-character limit merely to illustrate the conclusion that the search was "excessively intrusive" under *O'Connor*, when measured against the purpose of the search as found by the jury. *Id.* at 134. Accordingly, the court of appeals concluded that the search violated the Fourth Amendment.[2] *Id.* at 36.

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[2] Plaintiffs also successfully appealed the district court's summary judgment ruling against them and in favor of Arch Wireless. The Ninth Circuit reversed the district court, holding that Arch Wireless clearly fit the definition of a "provider" of an "electronic communication service" when it provided

(Continued on following page)

E. The Petitions For Rehearing.

The Ontario defendants petitioned for panel rehearing and rehearing en banc on the grounds that: 1) the panel's ruling undermined the "operational realities of the workplace" standard of *O'Connor*, 480 U.S. at 717 (plurality opinion); 2) the panel erroneously utilized a "less intrusive methods" test when reviewing the scope of the search; and 3) the panel overextended Fourth Amendment protection to individuals who send text-messages to a government employee's workplace pager.

Panel rehearing and rehearing en banc were denied. *Id.* at 125. Judge Ikuta, joined by six other judges, dissented from the denial of rehearing en banc. *Id.* at 136-50. Judge Wardlaw filed an opinion concurring in the denial of rehearing en banc. *Id.* at 125-36.

SUMMARY OF ARGUMENT

Although the Ninth Circuit viewed this case as an opportunity to examine what it considers "a new frontier in Fourth Amendment jurisprudence that has little been explored," App. 24, its analysis did not

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text-messaging services to the City. *See* App. 14-21. As a result, when Arch Wireless divulged the messages to the City, who was a "subscriber," and not "an addressee or intended recipient of such communication," without the consent of plaintiffs, it violated the SCA.

stray from this Court's principles in *O'Connor v. Ortega*, 480 U.S. 709 (1987). In *O'Connor*, a plurality of this Court reiterated that "[i]ndividuals do not lose Fourth Amendment rights merely because they work for the government," *id.* at 717, and announced that government employees' expectations of privacy in the workplace must be judged by the "operational realities of the workplace," *id.* at 715. As a result, the analysis is necessarily fact-driven and requires an examination of all the circumstances surrounding the search. While petitioners state that they agree with the sound principles under *O'Connor*, their analysis suggests otherwise.

First, petitioners argue that Sergeant Quon cannot have a reasonable expectation of privacy given the employer-employee nature of his relationship with the City of Ontario. Pet. Br. 15, 29-31. In the petitioners' words, "[w]hatever expectation of privacy a sender or recipient of text-messages on a government employer's equipment can ever legitimately have – if any – certainly none existed within the operational realities of the Ontario Police Department." *Id.* at 29. However, *O'Connor* dispels this very argument, reiterating that government employees do not lose their constitutional rights by virtue of their employment.

Second, petitioners suggest that the Ninth Circuit failed to appreciate that the City of Ontario "had a written no-privacy policy that applied to the pager," *id.* at 15, 31-35, and that messages could be disclosed under the California Public Records Act, *id.* at 15,

35-41. In light of these "most salient facts of the case," *id.* at 15, petitioners argue that the Ninth Circuit erred. However, by carefully focusing only on those facts which support of their argument, petitioners mischaracterize the Ninth Circuit's decision as one that dramatically undercuts *O'Connor*'s "operational realities of the workplace" standard.

As stated by the Ninth Circuit, the "operational reality . . . was fundamentally transformed" within the Ontario Police Department "by Lieutenant Duke's conscious decision not to enforce" the general computer policy. App. 90. Both the Ninth Circuit and the district court recognized the City had no express policy governing the use of text-message pagers. *Id.* at 4, 47. Rather, Lieutenant Duke simply announced at a supervisory staff meeting that the City's computer policy would govern the use of the newly-acquired pagers. *Id.* at 48. His announcement was later documented in the minutes of the meeting. *Id.* The City never bothered to revise its computer policy to include the text-message pagers, nor did it ever issue a written directive to its employees. Furthermore, Lieutenant Duke modified his own announcement that the computer policy applied to the pagers by stating that he would not audit the text-messages as long as personnel paid for any overage charges. Thus, Lieutenant Duke – the only individual to announce a no-privacy policy for the pagers – implemented a different policy guaranteeing officers their privacy.

Moreover, petitioners faced the additional legal burden of having no lawful means to actually conduct their search without the consent of respondents. The text-messages were kept by Arch Wireless, and could only be disclosed after obtaining the consent of the plaintiffs. In the absence of such consent, the messages could not legally be turned over without violating the SCA. Because the SCA protects the communications from disclosure, those communications are statutorily exempted from the California Public Records Act. Against each of these factual and legal circumstances, the Ninth Circuit properly affirmed the district court's assessment of the operational realities of the workplace, and concluded that Sergeant Quon possessed a reasonable expectation of privacy in his messages.

Third, petitioners argue that the Ninth Circuit improperly relied upon a "less intrusive methods" analysis when considering the scope of the search. Pet. Br. 19, 45-52. This notion is quickly dispelled by both the opinion itself and the panel's concurring opinion in the denial of rehearing en banc. Instead, public employer searches for noninvestigatory, work-related purposes must be justified at their inception and must be reasonably related in scope and not excessively intrusive. *O'Connor*, 480 U.S. at 726.

Here, the Ninth Circuit erred in finding that petitioners' search was justified at its inception. In order to be justified at its inception, there must be reasonable grounds for suspecting that the search is necessary. Lieutenant Duke's policy of not auditing

the officers' messages in exchange for paying the overages rendered the search unnecessary for its stated purpose. The officers were told that if they felt the messages were work-related, they could contest the overage charges and not have to pay. App. 50. As the district court found, this practice "allowed, condoned and even encouraged" officers to exceed the character limit. *Id.* at 98. Consequently, a search designed to ensure that officers were not being required to pay for work-related text-messages was unnecessary under these particular circumstances.

Nevertheless, the Ninth Circuit properly found that the search was excessively intrusive in light of the narrow purpose of the search. The court carefully balanced the parties' interests and determined that the search was excessively intrusive when measured against the purpose of the search as found by the jury. As explained by the Ninth Circuit's concurring opinion in the denial of rehearing en banc, the court of appeals "did not apply a 'less intrusive means' test." *Id.* at 134.

Finally, the Ninth Circuit reviewed this Court's precedents, resulting in its determination that the remaining plaintiffs, Steve Trujillo, April Florio and Jerilyn Quon, each had a reasonable expectation of privacy. While challenging that determination, petitioners neglect to explain their belief that the Ninth Circuit's analysis is "mistaken." *Id.* at 61. The Ninth Circuit applied this Court's various principles and likened text-messaging – a primary method of communication in this country – to telephone calls and

letters. Finding no meaningful difference between these methods of communication, the Ninth Circuit found that the remaining plaintiffs possessed an expectation of privacy. In this sense, the Ninth Circuit's opinion is rather straightforward and a practical application of the rule of law.

Further, the existence of the SCA and the fact that the remaining plaintiffs were also employed by the City, but were never told that the computer policy applied to the pagers, bolsters their expectation of privacy. Indeed, Steve Trujillo, April Florio and Jerilyn Quon's expectations of privacy are reinforced by the City's violation of the SCA in order to obtain the personal communications. Sergeant Trujillo was also a SWAT member and likely aware of Lieutenant Duke's policy allowing officers to use the pagers for personal use as long as they pay for their overages. April Florio and Jerilyn Quon were dispatchers for the Police Department, but were never advised of Duke's announcement that purportedly incorporated text-messages into the computer policy. Consequently, the Ninth Circuit's conclusion that the remaining plaintiffs possessed a reasonable expectation of privacy is supported by the facts.

Accordingly, this Court should affirm the Ninth Circuit's opinion.

ARGUMENT

I. THE APPROPRIATE STANDARD FOR NON-INVESTIGATIVE SEARCHES BY GOVERNMENT EMPLOYERS IS SET FORTH IN *O'CONNOR V. ORTEGA*.

A. The Plurality In *O'Connor* Appropriately Reconciled The Privacy Interests Of Government Employees With Government Employers' Legitimate Interests In An Efficient Workplace.

The Fourth Amendment, as applied to the States and municipalities through the Fourteenth Amendment, *see South Dakota v. Opperman*, 428 U.S. 364, 365 (1976), protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. . . ." *id.* at 381 (quoting U.S. Const. amend IV). A person has Fourth Amendment rights only in those areas and items where he or she has "an expectation of privacy that society is prepared to consider reasonable." *O'Connor*, 480 U.S. at 715.

The reasonableness of a government employee's expectation of privacy in his or her workplace was addressed in *O'Connor*, the Court rejected the notion that public employees can never have a reasonable expectation of privacy in their place of work. Quite to the contrary, the Court declared that "[i]ndividuals do not lose Fourth Amendment rights merely because they work for the government instead of a private employer." *Id.* at 717; *see also id.* at 731 (Scalia, J.,

concurring in the judgment) ("Constitutional protection against *unreasonable* searches by the government does not disappear merely because the government has the right to make reasonable intrusions in its capacity as employer.").

"The operational realities of the workplace, however, may make *some* employees' expectations of privacy unreasonable. . . ." *Id.* at 717. Thus, "[p]ublic employees' expectations of privacy in their offices, desks, and file cabinets, like similar expectations of employees in the private sector, may be reduced by virtue of actual office practices and procedures, or by legitimate regulation." *Id.* But the Court made it clear that an inquiry into whether an employee possesses a reasonable expectation of privacy is a highly fact-driven assessment of the *actual* working conditions. "Given the great variety of work environments in the public sector, the question whether an employee has a reasonable expectation of privacy must be addressed on a case-by-case basis." *Id.* at 718.

Furthermore, when a right of privacy is implicated, courts must weigh the nature and quality of the intrusion against the governmental interests at stake. *Id.* at 719; *see also United States v. Place*, 462 U.S. 696, 703 (1983) and *Camara v. Municipal Court*, 387 U.S. 523, 536-37 (1967). Thus, in the case of searches conducted by a public employer, the invasion of an employee's legitimate expectations of privacy must be balanced against the government's need for supervision, control, and the efficient operation of the workplace. *O'Connor*, 480 U.S. at 719-20.

Accordingly, public employer intrusions on the constitutionally protected privacy interests of employees for noninvestigatory, work-related purposes are to be "judged by the standard of reasonableness under all the circumstances." *Id.* at 725-26. Under this reasonableness standard, both the "inception" and the "scope" of the intrusion must be reasonable:

> Determining the reasonableness of any search involves a twofold inquiry: first, one must consider whether the . . . action was justified at its inception; second, one must determine whether the search as actually conducted was reasonably related in scope to the circumstances which justified the interference in the first place.

O'Connor, 480 U.S. at 726 (citations and internal quotation marks omitted).

The search will be permissible in its scope when "the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of . . . the nature of the [misconduct]." *Id.* (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985)).

B. This Court Should Adopt The *O'Connor* Plurality As A Majority Decision.

1. *O'Connor*'s Case-By-Case Approach To Assessing A Public Employee's Fourth Amendment Rights Is The Only Practical Manner In Which To Deal With The Divergent Workplaces That Exist.

In *O'Connor*, this Court made it clear that "[w]e have no talisman that determines in all cases those privacy expectations that society is prepared to accept as reasonable." *O'Connor*, 480 U.S. at 715. Instead, the Court must rely on such factors as "the intention of the Framers of the Fourth Amendment, the uses to which the individual has put a location, and our societal understanding that certain areas deserve the most scrupulous protection from government invasion." *Id.* (citing *Oliver v. United States*, 466 U.S. 170, 178 (1984)).

Thus, *O'Connor*'s approach to determining the reasonableness of an expectation of privacy, as well as the appropriate standard for a search, requires an extensive analysis of the case-specific facts. Such analysis is necessarily fact-driven and all of the relevant factual circumstances surrounding the search must be considered.

In *O'Connor*, this Court introduced and applied its "operational realities of the workplace" standard for determining whether an individual possessed a reasonable expectation of privacy. In *O'Connor*, the

Court unanimously recognized that Dr. Ortega had a reasonable expectation of privacy in his office and file cabinets. *O'Connor*, 480 U.S. at 718. That recognition was based upon record evidence disclosing the various operational practices, including that Dr. Ortega did not share his desk or file cabinets with other employees and that he occupied the office for 17 years and stored private property there. *Id.* Moreover, the employer did not establish any legitimate regulation or policy discouraging employees from storing personal property in their offices. *Id.*

The dissent in *O'Connor* agreed that "[g]iven . . . the number and types of workplace searches by public employers that can be imagined – ranging all the way from the employer's routine entry for retrieval of a file to a planned investigatory search into an employee's suspected criminal misdeeds – development of a jurisprudence in this area might well require a case-by-case approach." *Id.* at 733 n.2 (Blackmun, J. dissenting). Simply put, there would be no other way to accurately assess an employee's expectation of privacy without considering the unique situations presented by each employer's working conditions.

2. Circuit Courts Have Successfully Relied On This Framework.

The principle in *O'Connor* that the reasonableness of public employees' privacy expectations are to be measured on a case-by-case basis has become the rubric by which the circuit courts assess such cases.

Without question, those courts have successfully evaluated the actual working conditions, by assessing the various nuances within each employment setting.

For example, the Second Circuit, in *Leventhal v. Knapek*, 266 F.3d 64 (2d Cir. 2001) (Sotomayor), adopted the *O'Connor* approach to determine whether, under the "particular facts of [the] case," a New York state employee had a right to privacy in the contents of his work computer. *Id.* at 73-76 (citing *O'Connor*, 480 U.S. 709).

The Fourth Circuit, in *United States v. Simons*, 206 F.3d 392 (4th Cir. 2000), considered whether an engineer employed by the CIA had a reasonable expectation of privacy regarding information stored on his office computer. In its discussion of the Fourth Amendment, the Court cited a Seventh Circuit case to establish that the "holding of the *O'Connor* plurality governs" its analysis of whether government employees have a legitimate expectation of privacy in their workspaces. *See id.* at 398 (citing *Shields v. Burge*, 874 F.2d 1201, 1203-04 (7th Cir. 1989)). The Court went on to conduct a fact-intensive analysis consistent with the case-by-case rule outlined in *O'Connor*.

The Fifth Circuit, in *United States v. Johnson*, 16 F.3d 69 (5th Cir. 1994), articulated the *O'Connor* approach in appraising the reasonableness of a government employer's search of an employee's office in the wake of the employee's arrest. *See id.* at 73-74 (explaining that the employer's intrusion should "be

judged by the standard of reasonableness under all the circumstances." (quoting *O'Connor*, 480 U.S. at 725-26)). The Sixth Circuit, in *American Postal Workers Union, Columbus Area Local AFL-CIO v. U.S. Postal Service*, 871 F.2d 556, 560 (6th Cir. 1989), expressly adopted the *O'Connor* case-by-case approach to analyze whether postal employees had a reasonable expectation of privacy regarding the contents of their work lockers.

Likewise, the Seventh Circuit, in *Gossmeyer v. McDonald*, 128 F.3d 481, 490 (7th Cir. 1997), used the *O'Connor* approach to determine whether a state child protective investigator had a reasonable expectation of privacy regarding the contents of a personally-owned file cabinet located in her government office. *Id.* at 496 ("The [*O'Connor*] plurality observed that given the variations of work environments in the public sector, an employee's reasonable expectation of privacy must be assessed on a case-by-case basis." (citing *O'Connor*, 480 U.S. at 718)). The Seventh Circuit has since stated its understanding that *O'Connor* "necessarily requires a case-by-case inquiry." *Narducci v. Moore*, 572 F.3d 313, 321 (7th Cir. 2009).

The Eighth Circuit, in *United States v. Thorn*, 375 F.3d 679 (8th Cir. 2004), *vacated on other grounds by* 543 U.S. 1112 (2005), utilized the *O'Connor* framework in analyzing whether a government employee had a reasonable expectation of privacy in his office and the contents of his office computer. *Id.* at 683-85 (analyzing particularized facts of the case under *O'Connor* standard).

The Court of Appeals for the District of Columbia Circuit, in *Stewart v. Evans*, 351 F.3d 1239 (D.C. Cir. 2003), relied on *O'Connor* to determine whether a federal employee had a reasonable expectation of privacy to personal documents kept in a safe by her employer. *See id.* at 1243 ("[T]he reasonableness of an expectation of privacy . . . is understood to differ according to context. . . ." (quoting *O'Connor*, 480 U.S. at 715)).

Accordingly, a review of the various Circuit Courts demonstrate that *O'Connor*'s case-by-case approach has been successfully applied by the several circuits without question.

II. BY ILLEGALLY OBTAINING AND REVIEWING THE TRANSCRIPTS FROM ARCH WIRELESS, IN VIOLATION OF THE STORED COMMUNICATIONS ACT, THE ONTARIO DEFENDANTS VIOLATED SERGEANT QUON'S FOURTH AMENDMENT RIGHTS.

A. Sergeant Quon Had A Reasonable Expectation Of Privacy In His Text-Messages.

1. The City's Only Written No-Privacy Policy Did Not Expressly Apply To Text-Message Pagers.

Although "legitimate regulation" may reduce public employees' expectation of privacy in the workplace, *O'Connor*, 480 U.S. at 717 (plurality opinion), here, the City of Ontario had none. While many employers

may have explicit no-privacy policies regarding computers and electronic communications equipment that include text-messages, the City of Ontario never amended its computer policy to include text-message pagers. Both the district court and the Ninth Circuit reviewed the record evidence and found that the City did not have an explicit policy governing the use of text-message pagers. App. 4, 47.

Instead, the City maintained a general "Computer Usage, Internet and E-mail Policy" which does not mention the pagers. That policy dealt specifically with the use of email and computer Internet usage, but never indicated that it applied to any other electronic devices, let alone alphanumeric pagers issued and maintained by an outside vendor.[3] Although, petitioners are quick to emphasize in their brief with great detail the no-privacy warning given to Quon and Trujillo, the fact remains that it has no legal effect.

In 2000, well before the text-message pagers were acquired, Quon and Trujillo signed the acknowledgment form indicating they were aware of the computer policy. Since they signed the acknowledgment forms before the City ever acquired the pagers, and because the policy clearly does not encompass pagers, the City's computer policy in and of itself

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[3] Indeed, the computer policy explicitly applies to the "use of City-owned computers and all associated equipment. . . ." App. 151.

could never be viewed as a "legitimate regulation" that would reduce plaintiffs' expectation of privacy in the content of their text-messages. Under such an analysis, this case would be more akin to *O'Connor*, where no written policy existed.

2. Lieutenant Duke Established The Department's Policy That It Would Not Review Text-Messages.

Approximately eight months after obtaining the text-message pagers and knowing that the City did not have a written policy governing the use of those pagers, Lieutenant Duke, a Commander with the Ontario Police Department's Administration Bureau, informed his supervisory staff at a meeting that the text-messages "were considered e-mail, and that those messages would fall under the City's policy as public information and eligible for auditing." App. 5-6.

Thus, it was Lieutenant Duke who made the *sole* pronouncement that the City's computer usage policy now applied to the text-message pagers. That Lieutenant Duke is the only individual to ever establish the City's policy on text-message pagers defeats much of petitioners' claims.

First, that Lieutenant Duke would have to announce that the computer policy applied to the text-message pagers demonstrates that the written policy did not encompass the pagers. Why would Lieutenant Duke need to announce something that was already

spelled out in the policy? As a result, and as explained above, the existence of the computer policy by itself does not aide petitioners.

Second, and more importantly, it was also Lieutenant Duke who modified *his own* pronouncement that the policy applied. Buried in their argument, petitioners suggest that it was Chief Scharf who established the policy that the computer policy applied to the pagers. However, it was not. Lieutenant Duke made *his* pronouncement at the staff meeting and *his* pronouncement was memorialized in "the minutes" which were distributed to supervisory staff.

The April 29, 2002 memorandum from Chief Scharf contained the subject header: "SUPERVISORY STAFF MEETING MINUTES – APRIL 18, 2002." *See* J.A. 28. The memorandum, which read as minutes, contains separate headers for each supervisor's announcements. Under the header, "LT. DUKE," Lieutenant Duke indicated a "[r]eminder that two-way pagers are considered e-mail messages. This means that messages would fall under the City's policy as public information and eligible for auditing." *Id.* at 30. Chief Scharf made his announcements separate from Lieutenant Duke. *See id.* at 31. As a result, the only person responsible for advising Sergeant Quon that the computer policy governed the use of the pagers was Lieutenant Duke.[4]

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[4] Petitioners' suggestion that it was the Police Chief that formally expanded the "computer" policy to the text pagers is

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The fact that Lieutenant Duke is the only individual to attempt to establish a "no-privacy" policy that applied to the pagers is important. It renders Sergeant Quon and Trujillo's expectation of privacy objectively reasonable since the only individual to initially say they had no privacy later said that they did. Petitioners' argument that "Lieutenant Duke, in fact, lacked the power to countermand the official policy because . . . he was not a Department policy-maker" – simply carries no weight. Pet. Br. 42. The petitioners cannot have it both ways. Petitioners cannot wield Lieutenant Duke with policy-making authority to incorporate text-messages into the computer policy, but in the next breath claim he lacks the authority to amend the very same policy he enacted.

Here, the district court found that:

> Lieutenant Duke made it clear to the staff, and to Quon in particular, that he would *not* audit their pagers so long as they agreed to pay for any overages. Given that Lieutenant Duke was the one in charge of administering the use of the city-owned pagers, his statements carry a great deal of weight. Indeed, before the events that transpired in this

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without force. The minutes contain announcements by several individuals on a myriad of subjects, including the distribution of flag ribbons, J.A. 29 (announcement by Detective Courtney), and a requirement to sign out any training videos, J.A. 32 (announcement by Sergeant Cover). Merely announcing something at a meeting does not make it policy simply because the Chief of Police happened to be in the room.

> case, the department did not audit any employee's use of the pager for the eight months the pagers had been in use.

App. 90.

The district court found that Lieutenant Duke's actions "fundamentally transformed" the "operational reality" within the Department, and "[b]y doing so, Lieutenant Duke effectively provided employees a reasonable basis to expect privacy in the contents of the text-messages they received or sent over their pagers; the only qualifier to guaranteeing that the messages remain private was that they pay for any overages." *Id.* at 90-91. Accordingly, Lieutenant Duke's policy of not auditing the pagers became the context by which the Department operated an express policy that Sergeant Quon and Trujillo could and did reasonably rely upon.

The Ninth Circuit was guided by the fact that public employer searches must be guided by the "standard of reasonableness *under all the circumstances*." *Id.* at 30-31 (citing *O'Connor*, 480 U.S. at 725-26). The analysis is necessarily fact-driven, and all the factual circumstances surrounding the search must be considered. Here, both the district court and the Ninth Circuit considered all of the record evidence and reached the same conclusion, namely that Sergeant Quon possessed a reasonable expectation of privacy in his text-messages.

O'Connor's "operational realities" approach has been applied under virtually identical facts in the

U.S. Court of Appeals for the Armed Forces. In *United States v. Long*, 64 M.J. 57 (C.A.A.F. 2006), the court was presented with questions "regarding the reasonable expectation of privacy a military person has in e-mail messages sent and stored on a government computer system." *Id.* at 58. The service member was charged with violations of the Uniform Code of Military Justice, based upon several e-mails that she had sent and received. *Id.* at 59. She brought a suppression motion claiming that the e-mails were obtained in violation of her Fourth Amendment rights.

In analyzing her claim, the court of appeals understood that the inquiry into one's expectation of privacy "is understood to differ according to context" and that the case involved "emails sent and received on a government computer." *Id.* at 61. The court was also well aware "the military workplace is not the usual workplace envisioned by the Supreme Court in *O'Connor*" and the "military workplace can range from an office building to a bunker or tent in a combat zone." *Id.* at 62. In addition, the court was aware that every time an employee logged in to their email, a notification banner was displayed that informed the user that "[t]his is a Department of Defense computer system" and he or she should expect no privacy in their communication. *Id.* at 60.

However, like the present case, the military's "network administrator" established an office practice of not monitoring communications, because he felt it was "a privacy issue." *Id.* at 64. Although the emails were "originally prepared in an office in HQMC on a

computer owned by the Marine Corps and issued to [the employee]," and "were transmitted over the HQMC network system, stored on the HQMC server, and retrieved by the HQMC network administrator," these factors could not overcome the "persuasive" testimony describing the actual "agency practices and policies." *Id.* Consequently, just as in the present case, "the policies and practices of [the government] reaffirm rather than reduce the expectations regarding privacy on office computers." *Id.*

3. An Employee's Reasonable Expectation Of Privacy Cannot Be Defeated Merely By Announcing That It Will Not Be Respected.

In *O'Connor*, the Solicitor General and petitioners argued that public employees can never have a reasonable expectation of privacy in their place of work. *O'Connor*, 480 U.S. at 717. However, this Court rejected that notion, stating that individuals do not lose Fourth Amendment rights merely because they work for the government. As a result, the "operational realities of the workplace" standard was adopted.

Here, the Solicitor General and petitioners again make the exact same argument. Petitioners suggest that because the employment relation is that of a police officer and police department, no expectation of privacy can ever exist. Pet. Br. 29; *see also* Amicus Br., United States, 12. In that same vein, petitioners

suggest that by simply enacting a far-reaching no-privacy policy – which Ontario did not do here – an employer could completely extinguish an employee's expectation of privacy. However, that position has already been foreclosed.

In *Smith v. Maryland*, 442 U.S. 735 (1979), the Court wrote:

> Situations can be imagined, of course, in which *Katz*' two-pronged inquiry would provide an inadequate index of Fourth Amendment protection. For example, if the Government were suddenly to announce on nationwide television that all homes henceforth would be subject to warrantless entry, individuals thereafter might not in fact entertain any actual expectation of privacy regarding their homes, papers, and effects. . . . In such circumstances, where an individual's subjective expectations had been 'conditioned' by influences alien to well-recognized Fourth Amendment freedoms, those subjective expectations obviously could play no meaningful role in ascertaining what the scope of Fourth Amendment protection was. In determining whether a 'legitimate expectation of privacy' existed in such cases, a normative inquiry would be proper.

Smith, 442 U.S. at 740 n.5.

Indeed, in *O'Connor*, a majority of Justices found that the "[c]onstitutional protection against *unreasonable* searches by the government does not disappear merely because the government has the right to make

reasonable intrusions in its capacity as employer." *O'Connor*, 480 U.S. at 731 (Scalia, J., concurring); *id.* at 738 (Blackmun, J., dissenting) (quoting Justice Scalia). "[L]egitimate regulation" may only *reduce* a public employee's expectations of privacy in the workplace. *O'Connor*, 480 U.S. at 717.

An opposite rule, along the lines that petitioners suggest, would essentially result in the complete evisceration of Fourth Amendment rights by public employees – something this Court has already denounced. *See Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006) (public employees do not surrender all of their rights by virtue of their employment).

Similarly, in *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646 (1995), this Court held that random drug testing of student-athletes constituted a "search" under Fourth Amendment principles, even though the school put the student-athletes on notice that such drug testing would be mandatory and required consent.

An employee's expectation of privacy must be assessed in the context of the employment relation, which includes an assessment of all workplace conditions. To allow a no-privacy policy to completely disavow all employees' expectations of privacy, without regard for the unique circumstances existing in the workplace, would not be legitimate regulation.

4. The California Public Records Act Has No Applicability To Records Maintained By Arch Wireless.

Petitioners argue that respondents' expectation of privacy is diminished by the existence of the California Public Records Act (hereinafter "CPRA"), Cal. Gov't Code § 3250 et seq., as a "related operational reality attendant to Sergeant Quon's employment as a SWAT officer." Pet. Br. 35. To make this argument, petitioners adopt the Ninth Circuit's dissenting opinion that "[g]overnment employees in California *are well aware* that *every* government record is potentially discoverable at the *mere request* of a member of the public. . . ." *Id.* (citing App. 142-43). However, petitioners have cited no cases, nor has research revealed any, where courts have found that the mere existence of the CPRA or its federal analog, the Freedom of Information Act (hereinafter "FOIA"), have been deemed to constitute an operational reality. *Cf. Brunner v. U.S.*, 70 Fed. Cl. 623, 645 n.17 (2006) ("The Court holds that potential contractors cannot be imputed with knowledge of the contents of this manual . . . merely because an individual might ultimately secure the release of certain provisions of the manual by making a request under the Freedom of Information Act. . . .").[5]

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[5] In the context of the FOIA, the Ninth Circuit has recognized that lower level officials generally have a stronger interest in personal privacy than do senior officials. *See Hunt v. FBI*, 972 F.2d 286, 289 (9th Cir. 1992). This Court has further distinguished

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Even if the CPRA amounts to an "operational reality," respondents' text-messages were not public records under the CPRA. Public records are defined by the CPRA as "any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." Cal. Gov't Code § 6252(e). Here, the City of Ontario did not prepare, own, use, or retain the text-messages. And, as explained further below, the City had no legal right or means to access the content of plaintiffs' text-messages without their consent. *See* App. 20-21 ("When Arch Wireless knowingly turned over the text-messaging transcripts to the City, . . . it violated the [Stored Communications Act].").

Furthermore, disclosure is specifically exempted under the CPRA when the disclosure is prohibited by statute. Cal. Gov't Code § 6254(k). In those cases, the document is not considered "a writing" under the CPRA. *See id.*; *see also Copley Press, Inc. v. Superior Court*, 141 P.3d 288 (Cal. 2006) (holding police records at issue were exempted from disclosure under the CPRA by penal code provision); *Int'l Fed'n of Prof'l and Technical Eng'rs, Local 21, AFL-CIO v. Superior Court*, 165 P.3d 488 (Cal. 2007). Because disclosure of the text-messages in this case is exempted under

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between those public records which are "hard to obtain," and those records that are "freely available." *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 763-64 (1989).

California Government Code section 6252(k), the messages do not fall under the purview of the CPRA. Accordingly, petitioners' argument that the CPRA diminishes respondents' expectation of privacy necessarily fails.

Curiously, petitioners cite a few district court cases to show that some CPRA requests have been litigated. Pet. Br. 39 n.4. Those cases seem to do more harm than good to petitioners' argument. For example, the court in *State ex rel. Glasgow v. Jones*, 894 N.E.2d 686 (Ohio 2008), held that the request made under Ohio's Public Record Act for e-mail messages, text-messages, and correspondence sent to and from a state representative over a general period of time in her official capacity in the General Assembly was overbroad. The court noted that "[t]he requested text-messages and correspondence, however, are not records. The evidence is uncontroverted that Jones's text-messages do not document work-related matters. They are therefore not records subject to [the Ohio Public Records Act]." *Id.* at 691.

The disclosure of the text-messages at issue in this case violated the Stored Communications Act. As such, those messages are exempted from the CPRA by statute. Thus, the CPRA is not an operational reality as contemplated in *O'Connor*. As the district court reasoned, "There is no evidence before the [c]ourt suggesting that CPRA requests to the department are so widespread or frequent as to constitute 'an open atmosphere so open to fellow employees or the public that no expectation of privacy is reasonable.'" App.

31-32 (quoting *Leventhal,* 266 F.3d at 74). While a member of the public might have been free to request Sergeant Quon's text-messages under the CPRA, there were no legal means by which they could actually have been obtained absent his consent. As such, the mere existence of the CPRA does not diminish the plaintiffs' expectation of privacy under the facts of this case.

5. The Release Of The Text-Messages To The City And The Concomitant Violations Bolster Each Plaintiffs' Expectation Of Privacy.

Respondents agree with the premise underlying petitioners' CPRA argument – that statutes may indeed reflect whether society is willing to recognize an expectation of privacy as reasonable. *See, e.g., Florida v. Riley*, 488 U.S. 445, 451 (1989) (plurality opinion) (analyzing defendant's expectation of privacy by reference to FAA regulations); *California v. Greenwood*, 486 U.S. 35, 55 n.4 (1988) ("To be sure, statutes criminalizing interference with the mails might reinforce the expectation of privacy in mail. . . ."); *Doe v. Broderick,* 225 F.3d 440, 450 (4th Cir. 2000) (recognizing that a criminal statute prohibiting release of medical records is "relevant to the determination of whether there is a 'societal understanding' that [a patient] has a legitimate expectation of privacy in his treatment records"); *Rosales v. City of Los Angeles*, 82 Cal. App. 4th 419 (2000) (evaluating whether peace officers have an expectation of

privacy in light of state laws). Here, the SCA, as well as various state statutes, demonstrate society's recognition of a reasonable expectation of privacy in text-messaging given the context of this case.

The Ninth Circuit held that Arch Wireless violated the SCA by divulging Sergeant Quon's text-messages to the City of Ontario. App. 20-21. The SCA prevents "providers" of communication services from divulging electronic communications to certain entities and/or individuals. *Id.* at 13. In short, the SCA lawfully permits a provider of a "remote computing service" (hereinafter "RCS") to divulge communications "with the lawful consent of . . . the subscriber." 18 U.S.C. § 2702(b)(3). However, the SCA only permits providers of an "electronic communication service" (hereinafter "ECS") to divulge communications with the lawful consent of "an addressee or intended recipient of such communication." *Id.* § 2702(b)(1), (b)(3). In this case, it was undisputed that the City of Ontario was a "subscriber" of the service, and plaintiffs were either "addressee[s] or intended recipient[s]." App. 14.

The Ninth Circuit reviewed the plain language of the SCA as well as its rather unambiguous legislative history to find that Arch Wireless' services were properly considered an ECS under the SCA. Since Arch Wireless provided an ECS, it could not lawfully disclose the text-messages without permission of an "addressee or intended recipient." Accordingly, the

Ninth Circuit held that Arch Wireless' disclosure violated the SCA.[6]

That the SCA would foreclose Arch Wireless from disclosing the text-messages in question to the City of Ontario reinforces the reasonableness of all plaintiffs' expectations of privacy. Congress passed the SCA in 1986 as part of the Electronic Communications Privacy Act, 18 U.S.C. §§ 2510-2522, 2701-2712. *See* Orin S. Kerr, *A User's Guide to the Stored Communications Act, and a Legislator's Guide to Amending It*, 72 Geo. Wash. L. Rev. 1208, 1209-13 (2004). It was enacted with the understanding that with the advent of the Internet came a host of potential privacy breaches that the Fourth Amendment does not address. *Id.* The legislative history behind the SCA indicates that the legislature was concerned that "Americans have lost the ability to lock away a great deal of personal and business information." S. Rep. No. 99-541, at 3 (1986), *as reported in* 1986 U.S.C.C.A.N. 3555, 3556-57. The SCA was therefore enacted to instill a sense of security amongst users of electronic communications, including individuals like plaintiffs.

Because the SCA was enacted for the very purpose of instilling a sense of security amongst

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[6] Arch Wireless sought panel review and review en banc. Judge Ikuta issued a decision dissenting from the denial of rehearing en banc, but did not express any opinion about the Ninth Circuit's decision with regard to the SCA claim against Arch Wireless.

users, and because that very law prohibited the City from legally obtaining Sergeant Quon's transcripts, plaintiffs' expectation of privacy is objectively reasonable. Given the reality that the City could only view the communications with consent or by violating federal law, how could one not have a reasonable expectation of privacy?

Petitioners ask this Court to focus exclusively on three factors, each alleged to have eliminated Sergeant Quon's expectation of privacy. They include the police department/police employee relationship between Quon and the City, the existence of the City's written computer policy, and the existence of the California Public Records Act. Each of these factors are properly assessed under the *O'Connor* "operational realities" standard. However, the inescapable operational reality is that the City had no legal means to obtain the transcripts from Arch Wireless. Because the SCA precluded disclosure, the employment relationship and the City's policy authorizing an audit have no effect.[7]

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[7] Petitioners also argue that plaintiffs had a lessened expectation of privacy in the pagers because "[p]ublic employees . . . often occupy trusted positions in society," Pet. Br. 29 (quoting *Garcetti*, 547 U.S. at 419), and "the public legitimately holds police officers to more rigorous standards of conduct than ordinary citizens." *Id.* at 30 (quoting *Dible v. City of Chandler*, 515 F.3d 918, 928 (9th Cir. 2008)). The district court soundly rejected this same argument stating that it "loses its salience in light of the particular circumstances of this case." *Id.* at 93. "Appeals to broad societal norms quickly give way once an employer, like the defendants in this case, promulgates and announces a policy to its employees detailing how much privacy to expect in using specified equipment. At that point such general norms are

(Continued on following page)

Consequently, each of these operational realities affirm the reasonableness of the plaintiffs' expectation of privacy.

The Fourth Amendment protects "expectation[s] of privacy that society is prepared to consider reasonable." *O'Connor*, 480 U.S. at 715 (citing *United States v. Jacobsen*, 466 U.S. 109, 113 (1984)). By enacting the SCA, the legislature has decided that it is not only reasonable, but it is crucial that individuals maintain their privacy in their electronic communications.[8] Accordingly, it is reasonable for Sergeant Quon, and the remaining plaintiffs, to rely upon the SCA as a guarantee that their text-messages would not be reviewed.

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trumped by the *particular* norm that was implemented in the work place in question." *Id.* (quoting *United States v. Ziegler*, 456 F.3d 1138, 1145 (9th Cir. 2006) ("[W]e take societal expectations as they are, not as they could or (some think) should be.")).

[8] In addition, the California Invasion of Privacy Act, California Penal Code § 630 et seq., recognizes the privacy rights of its citizens in their telegraphic and telephonic communications. Section 637 criminalizes the unauthorized disclosure of such communications by third parties.

6. The Operational Realities Of The Workplace Make Clear That Sergeant Quon Had A Reasonable Expectation Of Privacy In His Text-Messages.

O'Connor holds that an employee's expectation of privacy must be viewed in light of the "operational reality" of the workplace. *O'Connor*, 480 U.S. at 717. Here, the operational reality is that the City had no official policy governing the use of text-message pagers. App. 6. The only individual who ever allegedly informed Sergeant Quon that his text-messages were covered under the general computer policy, also "made it clear to the staff, and to Quon in particular, that he would *not* audit their pagers so long as they agreed to pay for any overages." *Id.* at 30.

Indeed, Lieutenant Duke's policy was that he would not read the text-messages and would allow officers to maintain their privacy, as long as the officer in question paid the overage charge. *Id.* Quon was told, "if you don't want us to read it, pay the overage fee." *Id.* at 8. And in fact, Quon paid the overages 3 or 4 times and was not audited. *Id.* at 31.

Furthermore, Lieutenant Duke's policy-making authority – a factual dispute not presented to the district court – is irrelevant here. The City is content to rely upon Lieutenant Duke's policy that the text-message pagers are covered by the computer policy. However, in doing so, the City must be prepared to accept his ability to modify that same policy through

what petitioners label as an "accommodation." Pet. Br. 42. In any event, whether a decision-maker possesses final authority to establish municipal policy is only necessary to determine whether liability attaches to a municipality. *See Pembaur v. City of Cincinnati*, 475 U.S. 469, 481-82 (1986). Here, the task before the Court is a fact-specific inquiry into whether an expectation of privacy is reasonable in light of the "operational realities" of the workplace. Since Lieutenant Duke effectively set the policy, it would of course not be unreasonable to rely on his change of that policy.

Finally, the existence of the CPRA has no impact on the Court's "operational reality" analysis because Sergeant Quon's text-messages are not public records as defined by the CPRA. California Government Code section 6254(k) provides an exemption for "[r]ecords, the disclosure of which is exempted or prohibited pursuant to federal or state law. . . ." Since the disclosure of Sergeant Quon's text-messages was prohibited from disclosure under federal law, namely the SCA, those messages could not be disclosed under the CPRA. It follows that because the CPRA statutorily exempted the text-messages from disclosure, the CPRA cannot possibly be considered to have been part of Quon's operational reality. Since the City had no lawful means to obtain the text-messages and they are not subject to disclosure under the CPRA, Sergeant Quon maintained a reasonable expectation of privacy. Both the district court and the Ninth Circuit's ruling on these disputed facts are not clearly

erroneous and should thus be upheld. *See Blau v. Lehman*, 368 U.S. 403, 408-09 (1962); *Faulkner v. Gibbs*, 338 U.S. 267, 268 (1949); *United States v. Dickinson*, 331 U.S. 745, 751 (1947) (The "two-court" rule is the "long-established practice not to reverse findings of fact concurred in by two lower courts unless shown to be clearly erroneous.").

B. The City's Search Of Sergeant Quon's Text-Messages Was Unreasonable.

1. The Search Was Not Justified At Its Inception.

The Fourth Amendment's protection against "unreasonable" searches is enforced by "a careful balancing of governmental and private interests." *T.L.O.*, 469 U.S. at 341. Thus, after it is established that an employee has a reasonable expectation of privacy, the search must also be reasonable under all the circumstances. "[P]ublic employer intrusions on the constitutionally protected privacy interests of government employees for noninvestigatory, work-related purposes, . . . should be judged by the standard of reasonableness under all the circumstances." *O'Connor*, 480 U.S. at 725-26. Under this standard, courts must evaluate whether the search was "justified at its inception," and whether it "was reasonably related in scope to the circumstances which justified the interference in the first place." *Id.* at 726.

Ordinarily, a search is reasonable "at its inception" if "the search is *necessary* for a noninvestigatory

work-related purpose." *Id.* at 726 (emphasis added). Here, a jury decided that the purpose of the search was to insure that officers were not being required to pay for work-related text-messages. App. 33-34. Thus, the relevant question before this Court is whether the search of Sergeant Quon's private text-messages is *necessary* to insure that he was not being required to pay for work-related messages. The clear answer to this question is that it could not be.

First and foremost, a search that can only be accomplished through unlawful means can never be considered reasonable under the Fourth Amendment. It was not necessary to violate federal law in order for the City to determine whether Sergeant Quon was being required to pay for work-related text-messages. *See* App. 35-36 (Ninth Circuit's discussion of other ways in which the efficacy of the character limit could have been verified).

The *O'Connor* analysis presumes that the government has both the authority and the means to conduct the search. But because petitioners violated the SCA in this case, one can only conclude that they did not have the authority to conduct the search. As such, the search could not have been justified at its inception.

Notwithstanding this glaring defect, both lower courts agreed with petitioners, concluding with no analysis that a search to reveal the efficacy of the character limit is a legitimate work-related rationale and thus justified at its inception. App. 34, 102-03.

However, the proper focus is not only whether the employer has a legitimate purpose, but whether the search is "necessary" to achieve that purpose. *O'Connor*, 480 U.S. at 726.

The City had no reasonable basis to believe the search was necessary. The City already knew that officers were electing to pay overages rather than have their messages audited. More importantly, the officers were well aware that if they believed the overages resulted from work-related messages, they could contest the charge and have their messages reviewed. In practice, this process worked well. Officers paid for any overages and if they felt that the overages were for work-related matters they could contest the charge. The record is clear that Lieutenant Duke simply grew tired of being a bill collector. Since the City had already implemented safeguards to insure that the officers were not being forced to pay the City's bill, it is impossible to conclude that the search was "necessary." Because it was not necessary, it was not justified at its inception; and because it was not justified at its inception, it was unreasonable under *O'Connor*.

Furthermore, the district court specifically found that Lieutenant Duke's policy could not be said to reveal "misconduct," since Lieutenant Duke's actions "allowed, condoned, and even encouraged" officers to go over the character limit. App. 98. The district court indicated, "[i]n light of Lieutenant Duke's policy, the search would not have revealed misconduct; rather, it would have uncovered conduct permitted by

Lieutenant Duke to occur." *Id.* at 98-99. The factual finding made by the district court – that Lieutenant Duke's policy encouraged officers to exceed the monthly character limit (in return for paying the overage charges) – proves that the search lacked a reasonable basis, which also renders it unreasonable at its inception.

2. The Search Was Unreasonable In Scope And Was Excessively Intrusive.

A search is reasonable in scope "when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of . . . the nature of the [misconduct]." *O'Connor*, 480 U.S. at 726 (quoting *T.L.O.*, 469 U.S. at 342). Here, the Ninth Circuit balanced the competing interests, and held that there was a serious disconnect between the purpose of the search and the means in which the search was carried out. In light of the fact that the City explicitly agreed to maintain Sergeant Quon's privacy so long as he paid his overage charges, and because Lieutenant Duke's practice actually encouraged officers to exceed the character limit, the City's search was found by the Ninth Circuit to be excessively intrusive.

First, Sergeant Quon's Fourth Amendment rights are significant. The officers were specifically afforded the right to use the pagers for personal communication. In that regard, the pagers were issued to the

SWAT members as a benefit in order to relieve the City of financial liability for forcing them to be on-call 24 hours a day, 7 days a week. The written computer policy allows personal communication, and as the district court found, Lieutenant Duke's unwritten policy actually encouraged officers to use the pagers for that purpose. Thus, the City specifically allowed the officers to use the pagers as a *primary* method of personal communication, in addition to work-related business. In light of this, Quon's expectation of privacy is great and his interests are significant.

Petitioners fail to explain why Quon has no protected interest in using his pager for personal communications. Pet. Br. 45. Petitioners ignore the purpose for acquiring the pagers and their own written policy which expressly allows personal communication. Also, petitioners make no mention of Lieutenant Duke's privacy policy. That some of Sergeant Quon's messages were eventually discovered to be sexual in nature adds nothing to the analysis. In fact, many of Sergeant Quon's messages were sent off-duty and were not sexual in nature.

Second, contrary to petitioners' suggestion, the City's interest justifying the search was hardly as broad as to ensure "the work of the agency is conducted in a proper and efficient manner." *Id.* at 46 (citing *O'Connor*, 480 U.S. at 724). Rather, the purpose of the search was to determine if officers were paying for work-related charges – something the officers were already told they could challenge if they thought was the case. As a result, the Ninth Circuit

was charged with balancing these competing interests and found the search excessively intrusive. In light of all the circumstances, the finding is relatively straightforward.

In this regard, the most glaring problem with the petitioners' actions is that they opted to review the contents of all of Sergeant Quon's text-messages, work-related and personal, without his consent, and in violation of the SCA. The City did this despite Lieutenant Duke's stated policy stating that they would not. Thus, the Ninth Circuit properly held that Sergeant Quon's reasonable expectation of privacy – established primarily by the City itself – was not overcome by the City's interest in determining the efficacy of the character limit.

In *Narducci*, an employee brought a Fourth Amendment claim against his employer for surreptitiously recording phone calls in the department that he worked in. *Narducci*, 572 F.3d at 316-18. The employer recorded all phone calls, including personal calls, for the purpose of monitoring threatening calls. *Id.* at 321. The Seventh Circuit applied the *O'Connor* analysis, and found that the search was excessively intrusive in "that recording every single phone call made on those lines for years without ever notifying the employees was not a reasonable scope for the search." *Id.* In other words, the search was excessively intrusive in light of its purpose.

In contrast, in *Leventhal*, a government employee's computer was searched after receiving an

anonymous tip that the employee was engaging in misconduct by conducting personal affairs during work hours. *Leventhal*, 266 F.3d at 75. Acknowledging that the employee had an expectation of privacy in his computer, the employer implemented a systematic approach to searching his computer. *Id.* at 76. Rather than simply start opening up files and running programs, the employer began by printing out a list of file names to determine if the file names revealed whether they were work-related or not. After determining that certain files, based upon their names, were not work-related and therefore evidence of misconduct, the employer conducted three subsequent searches that consisted of copying the identified files and opening a few of them. *Id.* at 76-77. As a result, the Second Circuit carefully balanced the scope of the search and found that it was not excessively intrusive. *Id.* at 76.

Here, the Ninth Circuit identified several ways in which the City could have verified the efficacy of the character limit in order to demonstrate that the search was "excessively intrusive" under *O'Connor*:

> [T]he Department could have warned Quon that for the month of September he was forbidden from using his pager for personal communications, and that the contents of all of his messages would be reviewed to ensure the pager was used only for work-related purposes during that time frame. Alternatively, if the Department wanted to review past usage, it could have asked Quon to count the characters himself, or asked him to

> redact personal messages and grant permission to the Department to review the redacted transcript. Under this process, Quon would have an incentive to be truthful because he may have previously paid for work-related overages and presumably would want the limit increased to avoid paying for such overages in the future. *These are just a few of the ways in which the Department could have conducted a search that was reasonable in scope.*

App. 35-36 (emphasis added).

Reviewing all of the text-messages is an excessive manner in which to determine if the City needed to increase its character allotment. This is particularly so here, where the City told the officers it would not review their messages as long as they paid the overages and the officers did in fact pay the overages without issue. Petitioners opted to review all the messages – work-related and personal. This was excessively intrusive in light of the noninvestigatory object of the search. Under all the circumstances, the search was not reasonable in scope.

Finally, contrary to petitioners' suggestion, the Ninth Circuit did not adopt or apply a "less intrusive means" test for determining whether the search was reasonable. In the concurring opinion in support of denial of rehearing en banc, Judge Wardlaw addressed this very issue, stating unequivocally that the court "did not adopt a 'less intrusive means.'" App. 133. The opinion makes clear the City's actions

were excessively intrusive in light of the noninvestigatory object of the search. *Id.* at 133-34. The Ninth Circuit reached this holding based on the conclusion that Quon's "reasonable expectation of privacy in those messages" was "not outweighed by the government's interest-again, as found by the jury-in auditing the messages." *Id.* at 134.

In short, petitioners clearly lacked any reasonable basis to conclude that such the search was necessary. Officers were allowed, both by written policy and Lieutenant Duke's practice, to use their pagers for personal matters. *See* Pet. Br. 57. Officers were advised that if they felt the overages were the result of work-related business, they could contest the charge. As a result, a search to determine the efficacy of the character limit was not necessary and a search that entails reviewing every message for that purpose is excessively intrusive. For these reasons, the search was unreasonable.

III. SINCE THE SEARCH WAS UNREASONABLE AS TO SERGEANT QUON, IT WAS ALSO UNREASONABLE AS TO HIS CORRESPONDENTS.

The district court, the Ninth Circuit, and now petitioners, all acknowledge that *O'Connor*'s plurality opinion guides this Court's analysis of the electronic communications sent and received via Sergeant Quon's text-message pager. Thus, *O'Connor* applies whenever the government infringes upon "an

employee's expectation of privacy that society is prepared to consider reasonable."[9] *O'Connor*, 480 U.S. at 715.

It is well-settled that, "since 1878, . . . the Fourth Amendment's protection against 'unreasonable searches and seizures' protects a citizen against the warrantless opening of sealed letters and packages addressed to him in order to examine the contents." *Ex parte Jackson*, 96 U.S. 727 (1877); *see also United States v. Jacobsen*, 466 U.S. 109, 114 (1984) ("Letters and other sealed packages are in the general class of effects in which the public at large has a legitimate expectation of privacy.").

Accordingly, in *Katz v. United States*, 389 U.S. 347 (1967), this Court held that individuals have a reasonable expectation of privacy in the content of their telephone calls and the placement of a listening device on a telephone violated the individual's Fourth Amendment right. The Court reasoned:

> One who occupies [a phone booth], shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world. To read the Constitution more narrowly is to ignore the vital role that the

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[9] Petitioners do not dispute that all plaintiffs maintained a subjective expectation of privacy in the sending and receiving of text-messages. App. 88 n.6.

> public telephone has come to play in private communication.

Id. at 352.

However, this Court drew a meaningful distinction between the content of the communication, which is entitled to full Fourth Amendment protection, and the addressing information, such as the dialed telephone numbers, which are not protected. *See Smith,* 442 U.S. at 742. In *Smith*, this Court held that the use of a pen register – a device that records the phone numbers one dials – does not violate the Fourth Amendment because it did not acquire "the *contents* of communications." *Id.* at 741.

Thus, *Katz* and *Smith* held that a telephone caller does not forfeit his privacy right in the contents of the conversation, even though "[t]he telephone conversation itself must be electronically transmitted by telephone company equipment, and may be recorded or overheard by the use of other company equipment." *Smith*, 442 U.S. at 746 (Stewart, J., dissenting). These combined precedents recognize a heightened protection of the content of the communications.

The Ninth Circuit has applied these principles in two important decisions. In *United States v. Hernandez*, 313 F.3d 1206 (9th Cir. 2002), the Ninth Circuit applied the rationale from *Smith* to written letters, holding that individuals maintain privacy in the content of their written letters, but do not enjoy a reasonable expectation of privacy in what they write

on the outside of the envelope. *Id.* at 1209-10. In *United States v. Forrester*, 512 F.3d 500 (9th Cir. 2008), the Ninth Circuit extended the pen register and outside-of-envelope rationales to the "to/from" line of e-mails, stating that "e-mail . . . users have no expectation of privacy in the to/from addresses of their messages . . . because they should know that this information is provided to and used by Internet service providers for the specific purpose of directing the routing of information." *Id.* at 510.

Over 40 years later, after *Katz* was decided, one cannot ignore the vital role that electronic communications, like text-messaging, has come to play in today's private communications. The content of a text-message is the modern-day equivalent of the content of a sealed postal letter and the substance of a telephone conversation. Whether we like it or not, text-messaging is steadily becoming the primary manner of communication for the masses.[10]

Circuit courts have found that individuals do have an expectation of privacy in the content of a text-message. *Quon v. Arch Wireless Operating Company, Inc.*, 529 F.3d 892, 905 (9th Cir. 2008); *Warshak v. United States*, 490 F.3d 455, 473-75 (6th

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[10] As of June 2008, over 75 billion text-messages are sent every month. To put that into perspective, a typical U.S. mobile subscriber sends or receives 357 text-messages per month, compared to placing or receiving 204 phone calls. *See* CellSigns, Text-Message Statistics, http://www.cellsigns.com/industry.shtml (last visited Mar. 12, 2010).

Cir. 2007), *vacated on other grounds*, 532 F.3d 521 (2008) (en banc); *cf. United States v. Finley*, 477 F.3d 250, 259 (5th Cir. 2007) (finding reasonable expectation of privacy in text-messages). While the contents of electronic communications are given to a provider in a way that content of a letter is not, providers do not monitor the content of the communications. *Quon*, 529 F.3d at 895-96 (Text-messages are sent and received via a radio frequency transmission and are kept on a computer network and distributed electronically); *Warshak*, 490 F.3d at 473-75. That Arch Wireless may have been able to access the contents of the messages for its own purposes also does not defeat a sender's reasonable expectation of privacy. *See United States v. Heckenkamp*, 482 F.3d 1142, 1146-47 (9th Cir. 2007) (holding that a student did not lose his reasonable expectation of privacy in information stored on his computer, despite a university policy that it could access his computer in limited circumstances while connected to the university's network); *United States v. Ziegler*, 474 F.3d 1184, 1189-90 (9th Cir. 2007) (holding that an employee had a reasonable expectation of privacy in a computer in a locked office despite a company policy that computer usage would be monitored).

Since there is virtually no difference between the privacy rights of the sender of text-messages and those of letters or telephone calls, the same standards apply. Accordingly, the Ninth Circuit found no meaningful

difference between the sending of letters and e-mails versus text-messages.

Furthermore, when an individual engages in communication with another individual, his or her reasonable expectation of privacy depends on that other individual. The Ninth Circuit noted that absent an agreement to the contrary, plaintiffs Trujillo, Florio, and Jerilyn Quon had no reasonable expectation that Sergeant Quon would maintain the private nature of their text-messages, or vice versa. *See United States v. Maxwell*, 45 M.J. 406, 418 (C.A.A.F. 1996) ("[T]he maker of a telephone call has a reasonable expectation that police officials will not intercept and listen to the conversation; however, the conversation itself is held with the risk that one of the participants may reveal what is said to others." (citing *Hoffa v. United States*, 385 U.S. 293, 302 (1966))). Thus, had Sergeant Quon voluntarily permitted the City to review his text-messages, the remaining plaintiffs would have had no privacy claims. *See United States v. White*, 401 U.S. 745 (1971) (no Fourth Amendment violation when the government gains one party's consent to eavesdrop on a telephone conversation). Since Sergeant Quon maintained an expectation of privacy in his text-messages, so too did the remaining plaintiffs.

Finally, petitioners argue that it would always be unreasonable to believe that a sender of a text-message to a government pager would have an expectation of privacy in the message. Pet. Br. 63. In order to have an expectation of privacy, petitioners

argue that the sender would have to believe that the recipient's employer does *not* have a no-privacy policy in place. Petitioners argue that such a belief would be unreasonable, presumably without examining the context or all of the relevant circumstances. The record involving the plaintiffs in this case is clear and contains no evidence that plaintiffs Florio and Jerilyn Quon were ever told by Lieutenant Duke that the computer policy governed the use of the pagers. As a result, the only evidence on this point is that they had no reason to believe the City could review the messages they sent to Sergeant Quon. *See* petitioners' Supplemental Excerpts of Record 303, 307 (declarations of Florio and Jerilyn Quon attesting to a lack of knowledge of any policy that would allow the City to review the private text-messages that were sent to Jeff Quon). Additionally, Sergeant Trujillo was a SWAT member and would have been aware of Lieutenant Duke's policy not to review the text-messages. Consequently, the facts support the reasonableness of the remaining plaintiffs' expectation of privacy based upon their own operational realities.

In short, the Ninth Circuit properly applied this Court's precedent to what is rapidly becoming the primary mode of communication for many citizens. Trujillo, Florio and Jerilyn Quon's expectations of privacy are all inherently linked with Sergeant Quon's in this case. Accordingly, the search was unreasonable as to all respondents.

CONCLUSION

For the foregoing reasons, the Ninth Circuit's judgment should be affirmed in favor of respondents Jeff Quon, Steve Trujillo, April Florio and Jerilyn Quon.

March 2010

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In The
Supreme Court of the United States

CITY OF ONTARIO, CALIFORNIA,
ONTARIO POLICE DEPARTMENT,
and LLOYD SCHARF,

Petitioners,

v

JEFF QUON, JERILYN QUON,
APRIL FLORIO, and STEVE TRUJILLO,

Respondents

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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ARGUMENT

I. GIVEN THE "OPERATIONAL REALITIES OF THE WORKPLACE," SERGEANT QUON HAD NO REASONABLE EXPECTATION OF PRIVACY VIS-À-VIS THE DEPARTMENT IN TEXT MESSAGES SENT ON A DEPARTMENT-ISSUED PAGER.

A. Sergeant Quon's Expectation Of Privacy Vis-À-Vis The Department Was Diminished By The Fact He Was A SWAT Leader Using A Department-Issued Pager.

Petitioners established that under *O'Connor*, a government "employee's expectation of privacy *must* be assessed *in the context of the employment relation*." *O'Connor v. Ortega*, 480 U.S. 709, 717 (1987) (plurality opinion) (emphasis added). Respondents essentially ignore that here that relation is between a police officer and the department that employs him—a relationship this Court has recognized necessarily entails some compromise in the rights the officer might possess if he were in another, less publicly sensitive position. *E.g.*, *Kelley v. Johnson*, 425 U.S. 238, 245-247 (1976).

Sergeant Quon's employment as a police officer—indeed as a leader on the highly-visible SWAT team—surely affected the reasonableness of his expectation of privacy in communications on a Department-issued SWAT pager. As the dissenting opinion below explained, Sergeant Quon could not reasonably expect that the messages would never be reviewed by the

Department if requested by an investigating board or in litigation generated by SWAT actions or by the media App 142

B. Sergeant Quon's Expectation Of Privacy Vis-À-Vis The Department Was Diminished By The Official, Explicit No-Privacy Policy That He Was Repeatedly Informed Applied To The Pagers.

Respondents have conceded that "[v]irtually all governmental agencies have or will enact no privacy policies, which if remain undisturbed by practice, *would negate* or diminish an expectation of privacy" C A Ans Br to Pet Reh'g 12 n 3 (emphasis added) Now, however, respondents switch gears and argue that even an express policy could not "completely extinguish an employee's expectation of privacy" Resp Br 40 They cite a footnote in *Smith v Maryland*, 442 U S 735, 740 n 5 (1979), in which this Court discussed the effectiveness of the "reasonable expectation of privacy" test on the hypothesis that the government "suddenly announced 'on nationwide television that all homes henceforth would be subject to warrantless entry '" Resp Br 40

Smith offers respondents no support Certainly the government may not unilaterally take away the privacy that every citizen enjoys in his own home But that proposition says nothing about how a government employer may regulate the terms on which it loans its own property to its employees

Compare Kyllo v United States, 533 U S 27, 31 (2001) (privacy in home lies at core of Fourth Amendment) *with Engquist v Or Dep't of Agric* , 128 S Ct 2146, 2151 (2008) (government has significantly greater leeway with government employees than with citizens at large)

Moreover, the *Smith* footnote points out that in the event such a policy were announced aimed at mitigating an expectation of privacy, "a normative inquiry would be proper" 442 U S at 740 n 5 Such an inquiry here would only bolster *petitioners'* position Some of the very cases cited by respondents have looked to employers' no-privacy policies to determine whether employees' expectations of privacy were reasonable Resp Br 29-30 (citing, inter alia, *Leventhal v Knapek*, 266 F 3d 64 (2d Cir 2001) (Sotomayor, J) and *United States v Simons*, 206 F 3d 392 (4th Cir 2000)) The fact is that no-privacy policies like that present here *are* the norm (*see* authorities cited at Pet Br 32-33)—and for good reasons As the United States explained in its amicus brief, "[t]here are numerous valid reasons—indeed, compelling reasons—why most public and private employers adopt comparable policies," including protecting against malicious software, potential legal liability, and the breach of confidentiality of sensitive data U S Amicus Br 9, *see also id* 18-21

Respondents also concede, as they must, that Sergeant Quon was advised "that the City's existing *general* computer policy, which did not mention pagers, would govern the usage of the pagers " Resp

Br 1-2 And even while describing the informal overages accommodation on which respondents rely, Lieutenant Duke simultaneously and expressly *reminded* Sergeant Quon of the official policy's applicability to text messages As respondents themselves state "During this conversation, Lieutenant Duke told Quon that the text-messages sent over the City-owned pager 'were considered email and could be audited,' but went on to say 'that it was not his intent to audit employee's text messages to see if the overage is due to work related transmissions '" Resp Br 9 In turn, under the official policy, users of email, and thus text messaging, were expressly warned to "have no expectation of privacy or confidentiality," and that email, and thus text messaging, was "not confidential" and was "considered City property" App 152-153, ¶ III C -D [1]

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[1] Respondents argue that the City's official policy precluding privacy in electronic communications was ineffective here because it did not expressly mention the pagers Resp Br 32-34 Of course, the absence of explicit mention of pagers makes perfect sense since the policy was issued before the Department even obtained the pagers App 151, Supplemental Excerpts of Record ("S E R") 415-416 Moreover, as even respondents note, the policy's language broadly stated that it applied to the "'use of City-owned computers *and all associated equipment* '" Resp Br 33 n 3 (emphasis added) (quoting App 151), *see also* App 152, ¶ III A ("or other City computer related services"), 153, ¶ III D ("email or other electronic information") The policy acknowledgments signed by Sergeant Quon and Sergeant Trujillo similarly described "[t]he use of City owned computers *and related equipment*, email and the Internet[ ]" App 156-157 (emphasis added) Thus, although the

(Continued on following page)

In this key respect, respondents misplace reliance on—and flatly misrepresent the facts of—*United States v Long*, 64 M J 57 (C A A F 2006) In *Long*, the relevant agency policy was stated in a "log-on banner" on the office computer *Id* at 60 While respondents claim that the banner informed the user that "he or she should expect no privacy in their communication" (Resp Br 38), in reality, it did no such thing "The banner in the instant case did not provide Appellee with notice that she had no right of privacy" *Long*, 64 M J at 65 And the court expressly relied on that lack of warning to *distinguish* the case from one where the log-on banner *did* provide such notice and where the court thus found no reasonable expectation of privacy *Id* (citing *United States v Angevine*, 281 F 3d 1130, 1133 (10th Cir 2002)) Here, like *Angevine* and unlike *Long*, the policy expressly warned of no privacy

Respondents argue, however, that because it was Lieutenant Duke who also made the informal arrangement concerning auditing text messages for billing purposes, his announcement that text messages were subject to the official no-privacy policy was ineffective, thus, they claim, Sergeant Quon could reasonably have expected privacy in his text messages "since the only individual to initially say

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official policy did not expressly refer to the yet-to-be acquired pagers, it was broadly framed to encompass equipment other than just computers and modes of communication other than just email

[officers] had no privacy later said that they did" Resp Br 36

However, as respondents tacitly admit, Lieutenant Duke, unlike Chief Scharf, was not a policymaker, as illustrated by respondents' labored attempt to show that only Lieutenant Duke, and not Chief Scharf, gave the reminder that text messages were considered email under the written policy *See* Resp Br 35 ("Lieutenant Duke made *his* pronouncement at the staff meeting ") (emphasis in original) To the extent they characterize "Lieutenant Duke's policy-making authority" as "a factual dispute not presented to the district court" (Resp Br 50), they waived this contention by failing to raise it in their opposition to certiorari Sup Ct R 15, *City of Okla City v Tuttle*, 471 U S 808, 815 (1985) In any event, the Ninth Circuit expressly acknowledged that "Lieutenant Duke was not the official policymaker, or even the final policymaker" (while at the same time dismissing that fact as irrelevant because it did "not diminish the chain of command") App 31

And while Lieutenant Duke was the spokesperson who delivered the reminder that the Department considered pager messages to be emails within the official no-privacy policy, he clearly did so under the auspices of Chief Scharf, whom respondents have described as the Department's "final policy maker" C A Appellants' Opening Br 40 Lieutenant Duke made the announcement at a supervisory staff meeting at which the Chief—the head of the Department—was present J A 28

Indeed, it was Chief Scharf who distributed the memorandum memorializing the announcement to all supervisory personnel, including Sergeant Quon J A 28, 30 Sergeant Quon could not reasonably think the Chief did not endorse the announcement

C. Lieutenant Duke's Informal Bill-Paying Accommodation Did Not In Any Way Undermine The Applicability Of The Department's Official No-Privacy Policy To Text Messages.

Respondents rely on Lieutenant Duke's informal overages accommodation as the principal basis for their claim that Sergeant Quon had a reasonable expectation of privacy But even if Lieutenant Duke had the authority to exempt pager use from the official no-privacy policy, he did not do so Lieutenant Duke simply told Sergeant Quon that "he [Quon] could reimburse the City for the overage so that he [Duke] would not have to audit the transmission[s] and see how many messages were non-work related " J A 40 On its face, this was a *financial* arrangement intended to streamline the allocation of charges for pager use, not a privacy guarantee

In fact, not only did Lieutenant Duke never tell Sergeant Quon he could expect *privacy* vis-à-vis the Department, he told him the opposite When he told him that he would not audit in connection with billing for monthly overages (J A 83, S E R 174), at the same time, he also expressly reminded him that

the text messages "were considered email" (S E R 174) and were "public records" that "could be audited at any time " J A 40

Furthermore, in setting out his procedure for dealing with *overages*, Lieutenant Duke simply did not address any number of situations in which the Department might review the messages without monthly overages being in issue No reasonable officer could legitimately expect that Lieutenant Duke's financial arrangement could keep their text messages private from the Department given the ever-present potential for internal affairs investigations, media requests, public records requests, and litigation demands

And even if Lieutenant Duke's bill-paying accommodation could somehow unreasonably be misinterpreted as a forbearance of the official no-privacy policy, that would not suffice to alter the official policy As the United States has pointed out, "[a] brief period of underenforcement by a single subordinate officer does not detract from the force of a policy " U S Amicus Br 26 (citing *Monell v Dep't of Soc Servs* , 436 U S 658, 691 (1978)) Here, the Department had the pagers only a few months when Lieutenant Duke complained to Chief Scharf that he was tired of being a bill collector, and Chief Scharf responded immediately by ordering a review Pet Br 5-7

In sum, what is missing from any of Lieutenant Duke's statements to Quon is a single instance where,

even if he could, he purported to overrule the official policy's *no-privacy* provisions The potential for review of the messages under the official policy diminished any expectation of privacy vis-à-vis the Department that Lieutenant Duke's accommodation could possibly have fostered *See Smith*, 442 U S at 745, *California v Greenwood*, 486 U S 35, 39 (1988) (rejecting argument premising Fourth Amendment protection on fact that "there was little likelihood that [items] would be inspected by anyone")

D. The Ninth Circuit's Ruling Against Arch Wireless Under The SCA Does Not Retroactively Create A Reasonable Expectation Of Privacy Vis-À-Vis The Department.

Respondents argue that because the Ninth Circuit reversed the district court and held that Arch Wireless ("Arch") violated the Stored Communications Act ("SCA"), 18 U S C sections 2701-2712, when it voluntarily provided the text message transcripts to the Department, Sergeant Quon's "expectation of privacy is objectively reasonable" Resp Br 48 Not so

Preliminarily, although respondents now tout SCA protection as "the inescapable operational reality" in this case (Resp Br 48), in the Ninth Circuit they did not rely on the SCA at all for this purpose and instead touted Lieutenant Duke's bill-paying accommodation as the "inescapable reality"

C A Ans Br to Pet Reh'g 12 Accordingly, the certiorari petition presented no SCA issue This Court declined to grant Arch's conditional cross-petition, as respondents themselves urged

Respondents attempt to exploit those rulings by contending that because the Ninth Circuit has now held that the SCA prohibited Arch from disclosing the messages, it was "illegal" for the petitioners to obtain the messages from Arch But while respondents accuse petitioners of "illegally obtaining" the transcripts from Arch and "violating federal law" (Resp Br 32, 48), they offer no support for such a claim In fact, respondents *abandoned* their SCA claims against petitioners after the district court identified fundamental flaws in those claims and granted summary judgment to petitioners[2] Respondents concede that "the City of Ontario was a 'subscriber' of the service" (Resp Br 46), and they offer no support for their bald assertion that it was "illegal" for the City as subscriber and as an employer conducting a workplace review to ask for and receive the transcripts from Arch

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[2] The district court explained that petitioners (1) were not service providers under the SCA and (2) could not otherwise be liable under the SCA because "[s]ection 2703 concerns a governmental entity's attempt to gain information in electronic storage *during the course of a criminal investigation*" App 60-61 Respondents did not further pursue those claims in the Ninth Circuit App 11 n 3

In any event, respondents cite no controlling authority for the proposition that statutory protections *confer* a reasonable expectation of privacy, let alone one held by an employee vis-à-vis a government employer They cite a footnote in *Greenwood* for the proposition that "'statutes criminalizing interference with the mails might reinforce the expectation of privacy in mail '" Resp Br 45 (quoting 486 U S at 55 n 4) But respondents fail to acknowledge that the quote is from a *dissenting* opinion, and even that dissenting opinion stated in the same sentence that "the expectation of privacy in no way depends on statutory protection" *California v Greenwood*, 486 U S at 55 n 4 (Brennan, J , dissenting) As for the majority opinion, it *rejected* the suggestion that "expectation of privacy in [the defendant's] garbage should be deemed reasonable as a matter of federal constitutional law because the warrantless search and seizure of his garbage was impermissible as a matter of California law" *Id* at 43 (majority op) Respondents also cite the plurality opinion in *Florida v Riley*, 488 U S 445, 451 (1989), but that plurality relied on the fact that a law enforcement helicopter was *not* violating Federal Aviation Administration regulations in holding that a homeowner did *not* have a reasonable expectation of privacy that his greenhouse was protected from observation by the helicopter *Id* at 451

And even if the question whether Arch violated the SCA were relevant, the Ninth Circuit wrongly resolved that issue Both the district court and the

Ninth Circuit reasoned that whether the SCA permitted Arch to provide the transcripts to the City hinged on whether Arch was acting as a "remote computing service" ("RCS") (and thus permitted to provide the transcripts to the City as "subscriber" under 18 U S C § 2702(b)(3)) or as an "electronic communications service" ("ECS") (and thus prohibited from doing so without the consent of an "addressee or intended recipient" of the messages under 18 U S C § 2702(b)(1)) App 13-14, 63 While the district court concluded Arch was acting as an RCS, the Ninth Circuit concluded that it was acting as an ECS App 14, 20, 80 The Ninth Circuit thus held that "[w]hen Arch Wireless knowingly turned over the text-messaging transcripts to the City, which was a 'subscriber,' not 'an addressee or intended recipient of such communication,' it violated the SCA, 18 U S C § 2702(a)(1)" App 20-21

The Ninth Circuit's ruling was wrong As the district court correctly explained, Arch was variously acting as both an ECS and an RCS, but it acted solely in its capacity as an RCS when it provided archived copies of the text messages to the City in its capacity as subscriber on the account

> Certain aspects of Arch Wireless' service—the provision of text messaging (perhaps including the 72-hour short-term storage of such messages *before* they are opened and read by the recipient)—were the provision of purely electronic communications system, while others—the retrieval of the contents of

> those text messages kept in long-term storage on its computer network after they had been received—were that of a remote computing service

App 80 (relying on S Rep No 99-541, at 14 (1986), *reprinted in* 1986 U S C C A N 3555, 3568 ("Existing telephone companies and electronic mail companies are providers of electronic communication services Other services like remote computing services may also provide electronic communication services ")), *see also* Orin S Kerr, *A User's Guide to the Stored Communications Act, and a Legislator's Guide to Amending It*, 72 Geo Wash L Rev 1208, 1215 (2004) ("most network service providers are multifunctional" and statutory classification is "context sensitive")

The Ninth Circuit's error has not gone unnoticed *See Flagg v City of Detroit*, 252 F R D 346, 362 (E D Mich 2008) (reviewing the Ninth Circuit and district court rulings on whether Arch was acting as an ECS or RCS and "find[ing] the lower court's reasoning more persuasive, on a number of grounds"), Alyssa H DaCunha, Casenote & Comment, *Txts R Safe 4 2Day* Quon v Arch Wireless *and the Fourth Amendment Applied to Text Messages*, 17 Geo Mason L Rev 295, 322 (Fall 2009) (noting that the district court's determination of Arch's status under the SCA "better accords" with SCA's text and legislative history) This Court certainly should not predicate Fourth Amendment protection on the Ninth Circuit's erroneous SCA ruling

But whether the Ninth Circuit was correct or incorrect, protection under the SCA cannot form the basis for an objectively reasonable expectation of privacy in text messaging on a government employer's equipment, because whether the statute prevents disclosure of the messages to the employer depends on the application of complex statutory provisions to facts that the employee and those sending messages to the employee did not even know and could not control *See United States v Payner*, 447 U S 727, 732 n 4 (1980) (rejecting reliance on complex foreign law of bank secrecy as creating a "blanket guarantee of privacy" where it contained numerous exceptions and had not been construed) Respondents themselves have acknowledged that the facts regarding the actual service provided are key to how the SCA applies, noting that "not every 'storage' maintained by a provider of electronic communication will automatically constitute 'electronic storage[,]' " and "[a] court will be required to review the actual service provided between the entity and the provider " Opp to Cert 24 [3] And even if armed with the requisite facts, a government employee could not confidently prognosticate that the SCA would prohibit the service provider from providing its subscriber—the employer—with copies of the messages sent on

[3] Here, for example, respondents had no idea what sort of service that Arch contracted to provide the City or how Arch's service worked They did not even know that Arch archived copies of the messages *See* App 3, S E R 303-304, ¶ 4, S E R 307-308, ¶ 4

the subscriber's equipment "Courts and commentators alike agree on only one aspect of the statute it is highly technical and difficult to apply" DaCunha, *supra*, at 312

Moreover, here respondents could not have known that the SCA provisions on which respondents rely would apply at all As the United States points out, the Department could have demanded that Sergeant Quon turn over the Department pager he was using, thereby gaining access to any messages that had been delivered and were stored in the pager's memory *See* U S. Amicus Br 29 Indeed, respondents' theory all along has been that the City *could* audit but, pursuant to Lieutenant Duke's accommodation, Sergeant Quon could simply pay overages to avoid Department review Resp Br 10

In sum, respondents could not reasonably rely on the SCA to confer privacy There is no basis in fact or law for respondents' assertion that they could have harbored an objectively reasonable expectation of privacy based on the fact that years after the conduct in question, a court erroneously determined that an obscure and complex statute should have prevented a third party from providing records of the communications to the subscriber/employer

E. Any Reasonable Expectation Of Privacy Vis-À-Vis The Department Was Also Diminished Because The Text Messages Were Potentially Subject To Review And Disclosure In Response To Public Records Requests.

Respondents make no attempt to defend the lower courts' reasoning that potential public access under the California Public Records Act ("CPRA") (Cal Gov't Code § 6250, *et seq*) precludes a reasonable expectation of privacy only if CPRA requests were widespread or frequent App 32 Thus, they offer no response to petitioners' point that *Smith v Maryland* holds that it is the *potential* for review that eliminates any legitimate expectation of privacy *See* Pet Br 40

Moreover, respondents do not respond to petitioners' further point that they could have no reasonable expectation of privacy vis-à-vis the Department because, when public records requests are made, the public agency itself must review the requested records to determine whether disclosure is required As one amicus explains, even where it is claimed that the information sought is purely private, "the agency must review its own records to fulfill its statutory obligation of determining whether any information is private, and if so, to weigh the privacy interests against any legitimate public interest in disclosure of the information requested " L A Times Amicus Br 13

An amicus curiae brief supporting respondents argues, however, that to hold that potential production under the CPRA destroys a reasonable expectation of privacy would mean that "any document potentially subject to mere review—not even disclosure—whether under the CPRA [or similar statutes] would be stripped of *any* protection under the Fourth Amendment" EFF Amicus Br 33 Not so That argument ignores what is actually at issue here a reasonable expectation of privacy vis-à-vis Sergeant Quon's *government employer*, not law enforcement in general As petitioners pointed out—and respondents do not dispute—only the City, and not respondents, would even have a right to assert exemptions under the CPRA Pet Br 38

There is no merit to respondents' contention that "the City of Ontario did not prepare, own, use, or retain the text-messages" (Resp Br 43) and thus they did not constitute public records at all within the meaning of the statute, which defines a public record as "any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics" Cal Gov't Code § 6252(e) The City's official policy stated that "information produced in either hard copy or in electronic form is considered City property" App 153, ¶ III D Moreover, at least *some* of Sergeant Quon's text messages were actually job-related, i e , were prepared and used for City business Also, as petitioners pointed out, amici amplified, and respondents

fail to dispute, the public would have a very strong argument that even purely private messages by a SWAT officer abusing public resources would be subject to disclosure Pet Br 37, 58, League of Cal Cities Amicus Br 11, L A Times Amicus Br 20 And, as discussed above, the City in any event would have to review all text messages to determine if they were purely personal

Here, too, respondents argue that under the Ninth Circuit's SCA ruling, petitioners had "no legal right or means to access the content of plaintiffs' text-messages without their consent " Resp Br 43 They argue that disclosure would therefore be "specifically exempted under the CPRA when the disclosure is prohibited by statute " *Id* (citing Cal Gov't Code § 6254(k)) As explained above, the Ninth Circuit's SCA ruling was wrong In any event, though, section 6254(k) should not be interpreted to prohibit disclosing information based on where that information is stored, but rather based on the content *Cf Comm'n on Peace Officer Standards & Training v Superior Court*, 42 Cal 4th 278, 291, 64 Cal Rptr 3d 661, 165 P 3d 462 (2007) ("We consider it unlikely the Legislature intended to render documents confidential based on their location, rather than their content ") Respondents' reliance on the SCA is therefore misplaced

Finally, respondents argue that "[b]oth the district court and the Ninth Circuit's ruling on these disputed facts are not clearly erroneous and should thus be upheld " Resp Br 51-52 Their cited cases

involve factual findings after court trials Resp Br 52 (citing, inter alia, *Blau v Lehman*, 368 U S 403, 408-409 (1962)) There was no court trial on these issues, and the lower courts did not make any such factual findings on the CPRA issues, or any other issues for that matter, rather, they discussed the CPRA in ruling on cross-motions for summary judgment The only factual finding in this case was the jury's special verdict that the purpose of the transcript review was to determine the efficacy of the monthly character limit

II. THE DEPARTMENT'S SEARCH OF THE TEXT MESSAGES WAS REASONABLE AT ITS INCEPTION AND IN ITS SCOPE, AND THE NINTH CIRCUIT'S "LESS INTRUSIVE METHODS" APPROACH WAS ERRONEOUS AND REQUIRES REVERSAL.

Even if there was a reasonable expectation of privacy in the text messages, the Department's search of the text messages was lawful under the Fourth Amendment as long as it was reasonable under the circumstances *O'Connor*, 480 U S at 725-726 (plurality opinion), *see also id* at 732 (Scalia, J , concurring in the judgment) To determine reasonableness, the Court employs a balancing test, weighing the search's "intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests " *Vernonia Sch Dist 47J v Acton*, 515 U S 646, 652-653 (1995) (citations and internal quotation marks omitted)

Here the Ninth Circuit abdicated this role and instead utilized an improper "less intrusive methods" test to invalidate the search Properly assessed, the search was reasonable in its inception and scope

A. The Ninth Circuit Improperly Hypothesized "Less Intrusive Methods" And Failed To Balance The Interests.

In holding the search was unreasonable, the Ninth Circuit panel *expressly* applied a "less intrusive" means test (App 35) that this Court has repeatedly rejected *E g*, *Skinner v Ry Labor Executives' Ass'n*, 489 U S 602, 629 n 9 (1989) Respondents attempt to deny this reality with repeated references to the one-judge opinion concurring in the denial of rehearing en banc as an opinion by the "panel" or the "Ninth Circuit" Resp Br 22, 23 But not one other judge joined the concurring opinion *See* App 125 Nor did the Ninth Circuit panel ever amend the actual opinion to eliminate the express adoption and application of the discredited "less intrusive means" test from the Ninth Circuit's own pre-*Skinner* opinion in *Schowengerdt v General Dynamics Corp*, 823 F 2d 1328, 1336 (9th Cir 1987) *See* App 35

The dissenting judges below correctly noted that applying "less intrusive means" analysis is "exactly" what the panel did App 145 If the panel's analysis is not an improper use of "less intrusive means" methodology, it renders meaningless this Court's

admonition that "judges engaged in *post hoc* evaluations of government conduct can almost always imagine some alternative means by which the objectives of the government might have been accomplished" *Skinner*, 489 U S at 629 n 9 (internal citations and quotations omitted)

Respondents nevertheless contend that the Ninth Circuit's "holding was based on the court's 'conclusion that Quon's "reasonable expectation of privacy in those messages" was not outweighed by the government's interest—again, as found by the jury—in auditing the messages'" Resp Br 18 (purporting to quote App 35-36 (Ninth Circuit opinion) but actually quoting App 134 (opinion concurring in denial of rehearing)) This is simply another attempt to pass off the opinion of the lone judge concurring in the denial of rehearing en banc as if it were the Ninth Circuit's opinion The actual opinion says nothing about balancing competing interests

Amici curiae for respondents argue that the lines between home and the workplace have become blurred, thus tipping the balance in favor of employee privacy in employer-provided equipment But even if their premise is correct, that fact does not override a government employer's legitimate needs to promote efficiency, integrity, and safety *See Engquist*, 128 S Ct at 2151

As petitioners have also explained, accommodating *limited* personal use of electronic communications may make sense for both employers and

employees, but affording Fourth Amendment protection vis-à-vis the employer based on such accommodations would only incentivize employers to curtail such accommodations altogether *See* Pet Br at 58-59 (citing William J Stuntz, *Implicit Bargains, Government Power, and the Fourth Amendment*, 44 Stan L Rev 553, 579 (1992)) One amicus curiae for respondents argues instead that the burden should be on the employer to implement elaborate "data minimization" techniques and then, to conduct a search for data, submit to court-supervised protocols E P I C Amicus Br 6-12, 25-36 But even according to that amicus, "[s]ecurity experts agree that the best way to prevent loss or misuse of sensitive personal information is to avoid gathering or storing it in the first place " E P I C Amicus Br 7-8 Here, Sergeant Quon could have done that simply by using a personal pager

In sum, as explained below, under the *O'Connor* paradigm, the Department's review of the text message transcripts was certainly "work-related" and "reasonable[,]" 480 U S at 725-726 (plurality opinion), *id* at 732 (Scalia, J , concurring in the judgment), in "both the inception and the scope[ ]" *Id* at 726 (plurality opinion)

B. The Text Message Review Was Reasonable At Its Inception.

Petitioners' brief explains that the review of the text messages was reasonable whether undertaken to

determine the efficacy of the character limit, as the jury found, or to investigate pager misuse Pet Br 53-59 Respondents have no adequate response

Respondents argue the review was not justified at its inception for the former purpose because it was not "*necessary* to insure that [Sergeant Quon] was not being required to pay for work-related messages" Resp Br 53 (emphasis in original) They contend that Lieutenant Duke's bill-paying arrangement was working well But while no officer had thus far complained about Lieutenant Duke's bill-paying arrangement, there was no necessity to wait for a complaint, it was certainly reasonable for the Department to ensure that the officers were being treated fairly under that arrangement by checking to see that the character limit was adequate to cover job-related text messages

Moreover, although respondents acknowledge that Lieutenant Duke "grew tired of being a bill collector," they suggest this was not a valid basis on which the Department could proceed to investigate the character limit's efficacy Resp Br 54 But they ignore that, according to Lieutenant Duke, it was "very labor intensive to get people to pay for overages" J A 85, *see also* Resp Br 2 (contending that "various officers, including Sergeant Quon, exceeded the monthly character limit on several occasions") In the interests of efficiency alone, it was reasonable for the Department to seek a means of redressing this "labor intensive" task

Plaintiffs also argue that the "written computer policy allows personal communication," thus making the review unnecessary Resp Br 56 This is a non sequitur The review was needed to determine the *amount* of personal communications as opposed to job-related communications Reviewing the messages themselves was clearly a reasonable method of making that determination

At bottom, respondents' argument that the motivation for the search was unreasonable boils down to the claim that the Department was forced to stick with Lieutenant Duke's arrangement, no matter how unfair or inefficient it turned out to be That does not comport with *O'Connor*'s recognition that government employers need "wide latitude" to carry out workplace searches to "ensure the efficient and proper operation of the agency" 480 U S at 723-724 (plurality opinion)

As for searching for misconduct, respondents point to the district court's reasoning that Lieutenant Duke's bill-paying accommodation somehow "encouraged" personal pager use Resp Br 54 But respondents simply ignore that even if Lieutenant Duke's accommodation arguably condoned *some* personal use, it did not condone (1) *excessive* personal use or (2) *on-duty* personal use Pet Br 57-58 Spending an inordinate amount of time texting means not attending to the job, and that is misconduct even if *some* personal use is allowed

Respondents also attempt to make much of the fact that the Department had not previously undertaken any reviews of text messages But Chief Scharf ordered the review only a few months into the pager program and immediately after Lieutenant Duke first voiced concerns about bill-collecting There is nothing unreasonable about a government employer seeking to remedy a problem only when it first emerges Under respondents' argument, even where an employer has a valid no-privacy policy, the first nonconsensual search of communications on any newly acquired technology necessarily violates the Fourth Amendment because there has been no previous enforcement of the policy And, perversely, under that rule, more and more searching by an employer prevents—rather than causes—Fourth Amendment violations That is neither a reasonable rule nor one required by the Fourth Amendment

C. The Review Was Reasonable In Its Scope.

The proper analysis of the scope of an employer search under *O'Connor* is whether it is "reasonably related to the objectives of the search and not excessively intrusive in light of [its purpose]" 480 U S at 726 (plurality opinion), *accord Leventhal*, 266 F 3d at 73 Under this standard, the review of Sergeant Quon's text messages easily passes muster

The review was restrained and limited to two months and the two officers who had most exceeded

the character limit Notably, the period under review was *after* Sergeant Quon officially had been informed that the general no-privacy policy applied to the pagers Contrary to plaintiffs' argument (Resp Br 57-59), the search here was limited and targeted—nothing like the one determined unreasonable in *Narducci v Moore*, 572 F 3d 313, 321 (7th Cir 2009), which "include[d] the recording of every phone call, for at least a six-year period, with no notice to the affected employees "

Moreover, as the district court explained in detail—and petitioners' brief pointed out (Pet Br 55) but respondents fail to respond to—it *was* necessary to look at the contents of the text messages in order to accomplish the purpose of the search

> Even if talking to the officers beforehand may have brought to light information that some of the overages in question were for work-related reasons, only by performing an audit of the text messages themselves could the department confirm that the officers' recollection was accurate (which may be less than reliable given the passage of time since the messages were typed or read on the pager by the officer) Looking at the telephone numbers dialed by the officers is equally problematic Although the telephone numbers may be a means of determining whether the person who was paged was a co-worker, that fact alone does not provide any definitive answer as to *what* those individuals were text-messaging each other

> about As demonstrated by the actual audit that was performed in this case, text-messaging a fellow employee could be done largely for personal, not work-related, reasons Thus, the only way to accurately and definitively determine whether such hidden costs were being imposed by the monthly character limits that were in place was by looking at the actual text-messages used by the officers who exceeded the character limits

App 102 And, contrary to one amicus curiae's argument, the fact that plaintiffs Florio and Jerilyn Quon were using private pagers did not necessarily mean messages exchanged with them were personal (AFL-CIO Amicus Br 14), people sometimes use personal equipment to conduct official business *See State ex rel Glasgow v Jones*, 119 Ohio St 3d 391, 396, 894 N E 2d 686 (2008) (state representative concedes that even email messages on private email account may document work-related activities under state public records act)

As the United States pointed out, the "less intrusive" means hypothesized by the Ninth Circuit "all depended on Quon's accurate and timely cooperation, see Pet App 35-36, which the City could reasonably think would not be forthcoming" U S Amicus Br 28 Whether or not other less intrusive alternatives were available, under all the circumstances present here, reviewing the actual text messages for only a limited period and of only the two officers who had most exceeded the character limit

was *a* reasonable means of determining whether the then-current character limit was adequate for job-related text messages And it was certainly reasonable in light of the policy that warned officers that they should not use the pagers expecting privacy—a policy in no way undermined by Lieutenant Duke's accommodation—because in light of that warning there was no reason to expect that the search would uncover highly sensitive personal material Because the search was reasonable, the Ninth Circuit ruling should be reversed with an order to affirm the district court judgment

III. SERGEANT QUON'S TEXT-MESSAGING PARTNERS HAD NO REASONABLE EXPECTATION OF PRIVACY VIS-À-VIS THE DEPARTMENT IN TEXT MESSAGES SENT TO A DEPARTMENT-ISSUED PAGER.

Respondents and their amici apparently recognize that the Fourth Amendment claims of the remaining three respondents hinge on whether Sergeant Quon's claim succeeds *See* Resp Br 60 ("Since the search was unreasonable as to Sergeant Quon, it was also unreasonable as to his correspondents "), E F F Amicus Br 37 (remaining plaintiffs' Fourth Amendment claims succeed if Sergeant Quon's succeeds but fail if his fails) Petitioners agree in part If Sergeant Quon's claim fails, so too do the remaining plaintiffs' claims But their claims fail in any event for the additional reason that they were knowingly sending messages to

Sergeant Quon's government *workplace* pager and could never have formed any reasonable expectation of privacy vis-à-vis his government employer

As petitioners' brief explains, Sergeant Quon's text-messaging partners could have no reasonable expectation of privacy in messages they sent to a Department-issued pager in light of the prevalence of employers' no-privacy policies and the fact that they knew they were sending messages to a Department-issued pager rather than to a personal pager Pet Br 61-62 Because most employers—and government employers in particular—notoriously have no-privacy policies that apply to the recipient's workplace electronic communications, the senders could not reasonably assume that their messages would not be reviewed by the Department *See* Pet Br 60-65, *see also id* at 31-33 Respondents provide no answers to these points

Respondents instead simply adopt the Ninth Circuit's reasoning analogizing text messages to telephone calls, regular mail, and email, arguing that Sergeant Quon's text-messaging partners had a reasonable expectation of privacy in the *content* of messages they sent to Sergeant Quon that could be vitiated only by his consent This approach fails for multiple reasons

Neither that reasoning nor their cited authorities address a third party's expectation of privacy in communications sent to a person's *workplace*, let alone to a police department They do not involve, for

example, sending a letter addressed to a police officer at the police department and whether one would have any reasonable expectation that the Department would not view the letter's contents Obviously, that would be entirely unreasonable—the Department, as the officer's employer, could have any number of valid reasons to review the contents of the letter before or after delivering it to the officer named on the envelope and could have in place a policy of doing exactly that

Nor is it relevant that here the text messages were obtained from the City's account with Arch as opposed to a City-owned server or the pager itself The City is the subscriber on the Arch account, Arch was the City's agent Delivery of the messages to Arch was analogous to delivery of mail to an employer's mailroom In both circumstances, further delivery may be needed before the messages reach their ultimate recipients, but senders can have no reasonable expectation of privacy in the contents of the messages that have been delivered to the employer's agents

Indeed, respondents' argument and authorities do not address government employers' work-related searches at all, but only law enforcement searches Whether or not one could have a reasonable expectation of privacy in a text message sent to a private party's pager vis-à-vis the government in its law enforcement capacity, it is not objectively reasonable to expect privacy in a text message sent to

a government employee's government-issued pager vis-à-vis the government in its capacity as employer[4]

"[A] person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." *Smith v Maryland*, 442 U S at 743-744 Senders of text messages to an employee's workplace pager voluntarily convey even the contents of the messages to the intended recipient's employer Given the prevalence of employer no-privacy policies governing employees' electronic communications, the sender is voluntarily exposing the contents of messages to review by the intended recipient's employer *Cf California v Ciraolo*, 476 U S 207, 215 (1986) ("In an age where private and commercial flight in the public airways is routine, it is unreasonable for respondent to expect that his marijuana plants were constitutionally protected from being observed with the naked eye from an altitude of 1,000 feet")

As petitioners demonstrated, and respondents ignore, by 2002, when Sergeant Quon and the remaining plaintiffs exchanged text messages on the Department pager, a California appellate court had noted a study finding that "more than three-quarters of this country's major firms monitor, record, and review employee communications and activities on the job, including their telephone calls, emails,

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[4] In this context, Sergeant Quon effectively *did* consent to review by the employer, as he acknowledged in writing that he was subject to the City's written policy as a City employee

Internet connections, and computer files " *TBG Ins Servs Corp v Superior Court*, 96 Cal App 4th 443, 451-452, 117 Cal Rptr 2d 155 (2002) (no reasonable expectation of privacy in computer provided for employee's home use) Petitioners also demonstrated, and respondents do not dispute, that the remaining plaintiffs all knew their messages were going to a Department pager and not to a personal pager *See* Pet Br 61-62 Therefore, even if the senders subjectively intended that their messages would be viewed by only the employee, they would have no objectively reasonable basis to expect that the employer would not view the contents of the message *See Greenwood*, 486 U S at 39-40 (no reasonable expectation of privacy in opaque garbage bags left by homeowner for pick up by garbage collectors)

Respondents argue, however, that "[s]ince Sergeant Quon maintained an expectation of privacy in his text-messages, so too did the remaining plaintiffs " Resp Br 65 But Sergeant Quon's claim to privacy is premised principally on what Lieutenant Duke told him about his informal bill-paying accommodation And plaintiffs cite nothing in the record suggesting that Florio and Jerilyn Quon knew of Lieutenant Duke's accommodation, which is the entire basis for their claim that Sergeant Quon maintained privacy Plaintiffs flatly misstate that "April Florio and Jerilyn Quon were dispatchers for the Police Department " Resp Br 24 According to their own operative complaint, Jerilyn Quon's employment with the Department ended "in 1995 or

1996 " Excerpts of Record 38, ¶ 124 Although Florio was a police dispatcher, plaintiffs cite nothing in the record to indicate that Lieutenant Duke informed staff who did *not* receive Department-issued pagers of the bill-paying accommodation that he made for SWAT team members who *did* receive pagers and had overages Not surprisingly, Jerilyn Quon and Florio, in the very declarations upon which respondents rely, did not even purport to have any knowledge of Lieutenant Duke's policy S E R 303-304, 307-308

To be sure, Sergeant Trujillo was a fellow SWAT officer using a Department pager, but he could have had no objectively reasonable basis for expecting his messages to Sergeant Quon to remain private Not only did he sign an acknowledgment of the official no-privacy policy as to electronic communications, but any reasonable SWAT officer knew the operational realities that made it unreasonable to expect privacy in messages sent to the Department pager used by Sergeant Quon, including possible misconduct investigations, media requests, public records requests, and litigation requests Respondents cite nothing demonstrating Sergeant Trujillo's understanding of Lieutenant Duke's informal accommodation, but, in any event, that accommodation could not and did not promise privacy from the Department

Finally, the United States' brief provides ample additional reasons for this Court to reject the Ninth Circuit's sweeping, categorical extension of Fourth Amendment rights to individuals sending electronic

communications to a government workplace U S Amicus Br 28-32 In any event, because the Department viewed their messages sent to a Department-issued pager during a reasonable workplace search for the reasons explained in Argument II above, there was no Fourth Amendment violation

CONCLUSION

The Ninth Circuit's judgment should be reversed, with directions to affirm the district court's judgment

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 08-1332

In the Supreme Court of the United States

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v.

JEFF QUON, ET AL.

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TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING REVERSAL

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QUESTIONS PRESENTED

The United States will address the following questions:

1. Whether a government employee has a reasonable expectation of privacy in messages sent through government-issued communications equipment when his employer has notified him that his use of the equipment is subject to monitoring without notice.

2. Whether, if those messages are deemed private, a government employer's noninvestigative review is unreasonable under the Fourth Amendment because the employer reviewed the messages' content.

3. Whether the sender of a message has a reasonable expectation that the message will remain private once the message is delivered to the recipient.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING REVERSAL

INTEREST OF THE UNITED STATES

As the Nation's largest employer, the United States owns or leases hundreds of thousands of wireless communications devices, computers, and similar equipment for the official use of its employees. Federal agencies adopt and enforce policies regulating employees' expectation of privacy in using those resources. Furthermore, in its law-enforcement capacity, the United States investigates state and local government officials for criminal offenses such as public-integrity and civil-rights crimes; those investigations often involve evidence obtained from government-owned computers, communications equipment, and similar devices. In addition, the United States regulates the protection of individual privacy in electronic data and communications under various regu-

latory schemes. The United States accordingly has a strong interest in the resolution of the questions presented by this case. The United States filed a brief as amicus curiae in the court of appeals supporting rehearing en banc.

STATEMENT

1. This case involves messages sent between two-way, alphanumeric text-messaging pagers. In late 2001, the City of Ontario, California obtained 20 of the two-way pagers for use by its employees, including police officers. The City contracted with Arch Wireless Operating Co. for a text-messaging service involving multiple destination points: a message would go from the sender's pager to an Arch receiving station, then to Arch's computer server (where it would be archived), then to an Arch transmitting station, and ultimately to the recipient's pager. Pet. App. 3-4.

The City distributed several of the pagers to members of its SWAT team to assist in instant communication in urgent situations. Respondents Jeff Quon and Steve Trujillo, both SWAT sergeants, received pagers.

Before the City obtained the pagers, it promulgated a Computer Usage, Internet and E-Mail Policy (Policy), which applied to all City employees using the City's electronic resources. Pet. App. 151-155. The Policy contained a number of provisions specifying that the City could monitor its employees' use of electronic resources and that records of that use could be made public. For example, the Policy stated that the City "reserve[d] the right to monitor and log all network activity including e-mail and Internet use, with or without notice," and that "[u]sers should have no expectation of privacy or confidentiality when using these resources." *Id.* at 152. Sim-

ilarly, the Policy cautioned that "[a]ccess to * * * the e-mail system is not confidential; and information produced either in hard copy or in electronic form is considered City property. As such, these systems should not be used for personal or confidential communications." *Id.* at 153. Finally, the City specified that personal, non-business use of the e-mail system was limited to "'light' personal communications," *i.e.*, "personal greetings or personal meeting arrangements," subject to review for content by a department head. *Ibid.* Personal messages would also be treated as City records "subject to 'access and disclosure' in the legal system and the media." *Ibid.*

Both Quon[1] and Trujillo signed acknowledgments that they were aware of the Policy. Pet. App. 156-157. Each of the acknowledgments reiterated that the City "reserve[d] the right to monitor and log all network activity including e-mail and Internet use, with or without notice," and that "[u]sers should have no expectation of privacy or confidentiality when using these resources." *Ibid.*

After the City obtained the pagers, it decided to extend the e-mail policy to cover text messages sent through the pager network. In April 2002, Chief of Police Lloyd Scharf convened a meeting of his supervisory staff, at which an administrative officer, Lt. Steven Duke, gave a "[r]eminder that two-way pagers are considered e-mail messages. This means that messages would fall under the City's policy as public information and eligible for auditing." J.A. 30; see Pet. App. 48. Quon attended the meeting and subsequently received a memo from Chief Scharf, see J.A. 28, 30, memorializ-

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[1] Unless otherwise specified, "Quon" refers to Jeff Quon rather than his co-plaintiff and ex-wife Jerilyn Quon.

ing Lieutenant Duke's reminder that text messages were treated like e-mail under the Policy. Pet. App. 48.

2. The City's contract with Arch allowed each user 25,000 characters per month; any overage imposed additional costs. Pet. App. 45. Almost immediately, Quon exceeded his monthly character allotment. Lieutenant Duke directed Quon to pay for the overage for which he was responsible, a practice that Lieutenant Duke followed with other pager users as well. *Id.* at 7-8, 50. Although the parties' evidence differs on precisely what Lieutenant Duke said to Quon, Lieutenant Duke apparently did not want to spend his time auditing officers' text messages to determine whether the overage was work-related, and so told Quon that he would not audit the messages if Quon admitted responsibility and paid for the overages. *Id.* at 7-8, 49-51.

Quon repeatedly exceeded the monthly limit and was dunned for the overages. Pet. App. 8. In August 2002, Lieutenant Duke complained about having to collect the overage fees. Chief Scharf asked him if the monthly limit was too low to accommodate work-related messages, or if instead the overages were attributable to personal messages. He directed Lieutenant Duke to request the transcripts of the messages sent from the two pagers with the highest overage for that billing period, one of which turned out to be Quon's. *Id.* at 8, 52-54. The jury subsequently found that the purpose of the audit was indeed to verify the efficacy of the 25,000-character limit, not to view the content of anyone's messages. *Id.* at 12.

Arch provided the transcripts. It agreed to do so because the City was the account holder for the two pagers in question and authorized to obtain that information. Pet. App. 54.

"Many of the text messages sent and/or received by Quon's pager while he was on-duty were, to say the least, sexually explicit in nature." Pet. App. 54. Quon's interlocutors included his wife, Jerilyn Quon; a police dispatcher, April Florio, with whom he was having an affair; and Trujillo. *Id.* at 2, 55. Quon and Florio have alleged that they were disciplined based on the content of the text messages. C.A. E.R. 20-21.

3. Respondents—Jeff and Jerilyn Quon, Florio, and Trujillo—brought Fourth Amendment claims against the City, the Ontario Police Department, and Chief Scharf, as well as other claims not at issue here. The parties cross-moved for summary judgment.

Examining whether Quon had a reasonable expectation of privacy in the text messages sent through his City-issued pager, the district court first looked to the Policy. The court agreed that "Quon had been informed in writing and in person that the City considered the use of the pagers to fall within its e-mail policy, and that the City would monitor the use of its pagers." Pet. App. 89. The court further agreed that the Policy "would have put any employee on fair notice that the [text messages] were, in essence, open to the public for view." *Ibid.* And the court confirmed that, if the Policy were "all that was before it," it "would agree with [petitioners'] position that Quon would have no * * * reasonable expectation of privacy." *Id.* at 88-89.

The court concluded, however, that Lieutenant Duke had "in effect turned a blind eye to whatever purpose an employee used the pager [for], thereby vitiating the department's policy." Pet. App. 90. As a result, "Lieutenant Duke effectively provided [Quon] a reasonable basis to expect privacy in the contents of the text messages," so long as Quon paid for his overages. *Id.* at 90-91.

The district court next concluded that the reasonableness of the search presented a fact question. If Chief Scharf had ordered the audit as a way of testing the efficacy of the 25,000-character limit, then the search was reasonable, the court held. The court therefore set the case for trial on the question of Chief Scharf's intent. Pet. App. 103. The jury found that Chief Scharf had intended to examine the 25,000-character limit, and the district court therefore entered judgment for petitioners on the Fourth Amendment claims. *Id.* at 12, 119.

4. The court of appeals reversed in relevant part. Pet. App. 21-36, 39-40. It concluded that the examination of respondents' text messages had been a search that was "unreasonable as a matter of law" in violation of the Fourth Amendment. *Id.* at 21.

a. The court first held that Quon had a reasonable expectation of privacy in his text messages. Like the district court, the court of appeals observed that the Policy, taken alone, would defeat any reasonable expectation of privacy. See Pet. App. 29. But the court of appeals thought that Lieutenant Duke's actions amounted to an "informal policy" that negated the effect of the official one. *Id.* at 31. Petitioners had objected that Lieutenant Duke had no authority to negate the Policy; the panel rejected that argument, stating: "That Lieutenant Duke was not the official policymaker, or even the final policymaker, does not diminish the chain of command. He was in charge of the pagers, and it was reasonable for Quon to rely on the policy—formal or informal—that Lieutenant Duke established and enforced." *Ibid.*

The court of appeals also held that Quon's expectation of privacy was reasonable even if, as petitioners

contended, Quon's text messages were subject to disclosure on demand by any member of the public under the California Public Records Act, Cal. Gov't Code § 6253 (West 2008). The court of appeals held that the public-records law would only "slightly diminish" Quon's reasonable expectation of privacy, because disclosure requests were not "so widespread or frequent as to [create] an open atmosphere." Pet. App. 32 (citations omitted).

b. Next, the court held that the review of Quon's text messages had unconstitutionally infringed Quon's reasonable expectation of privacy. The court acknowledged that government employers may conduct some work-related searches, and that the City's purpose—evaluating the 25,000-character limit—was reasonable. Pet. App. 34. The court thought, however, that the search was not reasonable in scope, because "[t]here were a host of simple ways" to achieve that purpose without reviewing the content of any messages. *Id.* at 35.

c. Separately, the court of appeals held that, "[a]s a matter of law," the other respondents—Jerilyn Quon, Florio, and Trujillo—had a reasonable expectation of privacy in the text messages they had sent to Jeff Quon, and that petitioners had infringed that privacy right by obtaining the transcripts. Pet. App. 28; see *id.* at 27-29 & n.6. The court acknowledged that those three respondents "had no reasonable expectation that Jeff Quon would maintain the private nature of their text messages, or vice versa." *Id.* at 28. Accordingly, the court wrote, "[h]ad Jeff Quon voluntarily permitted the Department to review his text messages, [those three respondents] would have no claims." *Ibid.* But the court held that the Fourth Amendment precluded "third-party

review" except with "consent from either a sender or recipient of the text messages." *Id.* at 28-29.

The court of appeals thus concluded that all four respondents "prevail[ed] as a matter of law" on their claims against the City and Department. Pet. App. 40. The court held, however, that Chief Scharf was entitled to qualified immunity. *Id.* at 37-38.

4. The court of appeals denied rehearing en banc.

Judge Ikuta, joined by six other circuit judges, dissented from the denial of rehearing. Pet. App. 136-150. In Judge Ikuta's view, Quon's expectation of privacy "was either significantly diminished or non-existent" in light of the City's policy "that even personal messages are subject to 'access and disclosure'" and the possibility that all of Quon's text messages could be made public under the California Public Records Act. *Id.* at 141-142; see *id.* at 142-143. And, she noted, "Quon could have avoided exposure of his sexually explicit text messages simply by using his own cell phone or pager." *Id.* at 143. Judge Ikuta concluded that the panel had erred by dismissing these important considerations based solely on "the informal statement of Lieutenant Duke that he personally would not audit the pagers if the SWAT team members agreed to pay for any overages." *Ibid.*

Judge Ikuta also disagreed with the panel's conclusion that the scope of the search had been unreasonable. In her view, the panel should simply have asked whether the City's audit of the text messages was "reasonably related to the objectives of the search and not excessively intrusive in light of [its purpose]." Pet. App. 145 (brackets in original) (quoting *O'Connor* v. *Ortega*, 480 U.S. 709, 726 (1987) (plurality opinion)). She concluded that the panel erred in looking instead at whether the City could have conducted a less intrusive search, be-

cause this Court has repeatedly specified that a search need not be the "least intrusive means" to be valid under the "special needs" doctrine. *Id.* at 144-149.

Judge Wardlaw, author of the panel opinion, filed a concurrence responding to Judge Ikuta's dissent. Pet. App. 125-136. She contended that Lieutenant Duke's practice of not auditing text messages when officers paid for their own overages was an "express and specific," albeit "informal," City policy that gave Quon an expectation of privacy in his pager and "offset" the California Public Records Act in the analysis. *Id.* at 127, 132. Judge Wardlaw also stated that the panel's opinion "did not adopt a 'less intrusive means' test." *Id.* at 133.

SUMMARY OF ARGUMENT

A. The City provided Quon with a pager for official business and set the ground rules for its use. That policy was entirely legitimate, and nothing in the Fourth Amendment prevents it from having full effect. As the parties and the court of appeals all recognize, an employee has no reasonable ground to expect privacy in his employer-provided equipment when the employer has warned him not to have that expectation.

There are numerous valid reasons—indeed, compelling reasons—why most public and private employers adopt comparable policies, monitoring their computers and networked equipment and warning their employees that they will do so. A single employee's imprudent or malicious use of such devices, including a computer, pager, or "smart phone," can threaten the security of the employer's entire computer network, breach the confidentiality of sensitive data, or expose the employer to liability.

Without disputing these important interests, the court of appeals wrongly concluded that the City was liable here. The court reasoned that a lone lieutenant, who decided not to audit the use of a pager when the officer paid the full overage charge, overrode the City's official policy reserving the right to monitor and disclose employees' electronic communications. But this Court has often concluded that the acts of a subordinate officer do not bind an entire city. That is particularly so here, because the authority Lieutenant Duke exercised related only to overage collection. By contrast, the Policy was not limited to situations when an overage appeared: it told Quon he had no expectation of privacy in his text messages whatsoever.

B. The court of appeals also erred in holding that the City's audit violated the Fourth Amendment. The court did not dispute that the City could validly review the extent to which Quon used his pager for personal rather than official purposes. But the court appears to have held that if the City had any way to perform such an audit without looking at the content of the personal messages, the City was obliged to use that method. That analysis is inconsistent with *O'Connor* v. *Ortega*, 480 U.S. 709 (1987), and other special-needs cases. The proper analysis asks not what methods the City could have chosen, but whether the methods the City in fact chose were appropriate to effectuate its purpose. The City met that standard.

C. Because the City obtained all of the messages at issue through a valid search of the pager account assigned to Quon, the senders of those messages— Jerilyn Quon, Florio, and Trujillo—have no valid Fourth Amendment claim. Once their messages to Quon were delivered to his City-issued pager, they had no further

cognizable interest under the Fourth Amendment in what happened to those messages. A valid search of a person's papers frequently extends to papers sent by another person, such as an already-delivered letter. The original letter-writer has no right to object. So too here: the City had a constitutionally valid basis for searching Quon's text messages, and that basis extends to all of the messages, irrespective of who sent them.

ARGUMENT

THE CITY'S REVIEW OF TEXT MESSAGES FROM A CITY-ISSUED PAGER DID NOT VIOLATE THE FOURTH AMENDMENT

A. Quon Could Not Expect To Keep His Use Of The City's Paging System Private Because The City Policy Dispelled Any Expectation of Privacy

Quon did not own the pager or subscribe to the wireless communications service that he used to send text messages. To facilitate Quon's police work, the City provided him with both the device and the subscription, and the City also set the terms of their use. To establish that the Fourth Amendment precludes the City from inspecting the messages sent to or from the pager issued to him, Quon must prove "that he personally ha[d] an expectation of privacy in the place searched, and that his expectation [was] reasonable." *Minnesota* v. *Carter*, 525 U.S. 83, 88 (1998). Because the City specified that communications using the pager were public records, subject to monitoring and auditing, Quon cannot show that he expected his messages to be private or that society would treat as reasonable any such expectation.

1. Employers specify the terms upon which they provide communications, data, or storage facilities

An individual cannot have an expectation of privacy in property owned or lent by his employer unless "society is prepared to recognize [that sort of privacy interest] as 'reasonable.'" *E.g.*, *Oliver* v. *United States*, 466 U.S. 170, 177 (1984) (quoting *Katz* v. *United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)). Ascertaining whether society recognizes a protected zone of privacy in a particular context may at times be difficult. See, *e.g.*, *Carter*, 525 U.S. at 91 (Scalia, J., concurring) (describing the test as "fuzzy"). But that is not the case when an official policy squarely answers the question. When a government employer gives its employee access to a device or facility, but explicitly reserves its own right of access, the employee has no reasonable expectation of a right to exclude the employer.

"[T]he government as employer * * * has far broader powers than does the government as sovereign." *Engquist* v. *Oregon Dep't of Agric.*, 128 S. Ct. 2146, 2151 (2008) (citation omitted). As part of its role as employer, the government has broad authority to set rules, and corresponding expectations, in the workplace. That authority was recognized in this Court's leading case involving privacy in the government workplace, *O'Connor* v. *Ortega*, 480 U.S. 709 (1987). Justice O'Connor's opinion for four Justices observed that "[t]he employee's expectation of privacy must be assessed in the context of the employment relation." *Id.* at 717. The opinion further confirmed that in that context, the reasonableness of a claim of privacy "may be reduced by virtue of actual office practices and procedures, or by

legitimate regulation." *Ibid.*;[2] see *id.* at 739 n.5 (Blackmun, J., dissenting) (acknowledging that "[i]n some cases, courts have decided that an employee had no [reasonable] expectation [of privacy] with respect to a workplace search because an established regulation permitted the search," and noting that "[t]he question of such a search * * * is not now before this Court"). These opinions in *O'Connor* correctly recognize the significant role that an employer's policy plays under the Fourth Amendment in two distinct but complementary respects.

First, by establishing and communicating the terms of access, the government employer eliminates any subjective expectation of privacy that conflicts with those terms. Without "an actual expectation of privacy; that is, [a purpose] 'to preserve [something] as private,'" the employee has no Fourth Amendment claim. *E.g.*, *Bond* v. *United States*, 529 U.S. 334, 338 (2000) (second brackets in original) (quoting *Smith* v. *Maryland*, 442 U.S. 735, 740 (1979)). And the employee can hardly be said to have sought "to preserve [something] as private," *ibid.* (brackets in original) (quoting *Smith*, 442 U.S. at 740), when he places it within a zone of the government workplace where, according to express policy, the employer may look. An employee who ignores this policy and brings private material into such a sphere may have a desire for privacy, but cannot show an expectation of privacy.

Second, even if an employee did develop a subjective expectation of privacy under those circumstances, no such expectation would be reasonable. The core of the Fourth Amendment right is the protection of *one's own*

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[2] Justice O'Connor also noted that "the absence of * * * a policy does not create an expectation of privacy where it would not otherwise exist." *O'Connor*, 480 U.S. at 719.

"persons, houses, papers, and effects." Although this Court has recognized that the Fourth Amendment sometimes protects a privacy interest in a space formally owned or controlled by someone else, see, *e.g.*, *Minnesota* v. *Olson*, 495 U.S. 91, 98 (1990) (overnight guest at friend's home), not every invitation to enter such a space confers an accompanying privacy right. See, *e.g.*, *Carter*, 525 U.S. at 90 (defendants had no Fourth Amendment protection in an apartment they visited for a few hours to bag cocaine); *Rakas* v. *Illinois*, 439 U.S. 128, 148 (1978) (merely being "in [a] car with the permission of [the] owner" does not entitle the invited guest to borrow Fourth Amendment protections along with the car).

When an individual is claiming a privacy right based on an invitation from someone else—*e.g.*, to visit a place or use a communications device—the terms of the invitation naturally affect whether the individual can reasonably expect privacy if he accepts. For instance, an overnight guest "seeks shelter in another's home precisely because it provides him with privacy"—the host's privacy. *Olson*, 495 U.S. at 99. "The houseguest is there with the permission of his host, *who is willing to share his house and his privacy* with his guest." *Ibid.* (emphasis added). By contrast, someone who enters a residence only for a short business transaction receives no such "acceptance into the household" and no expectation of shared privacy. *Carter*, 525 U.S. at 90. Thus, while both *Olson* and *Carter* involved "a 'home' in which [the defendants] were present," *ibid.*, Olson and Carter entered those homes on different terms, and those terms conferred different expectations of privacy.

This focus on the terms of an invitation, and their consequence for any expectation of privacy, has particu-

lar force in the government-employment context. This Court's cases involving privacy in someone else's home, car, or property take as a given that the claimant does not expect privacy as against the property owner; rather, he hopes to share the property owner's own privacy from government intrusion. *Olson*, 495 U.S. at 99; accord *Mancusi* v. *DeForte*, 392 U.S. 364, 369 (1968); *O'Connor*, 480 U.S. at 730 (Scalia, J., concurring in the judgment). But in cases like this one, the claimant is demanding something still more. He is contending that when the government has permitted him to use a space or device, the government has also forfeited its own authority to intrude on his private use of that property. That contention is not reasonable when the government employer has told its employee at the outset that it is reserving all of its rights.

2. Employer-provided communications equipment is not subject to a different rule

Employers commonly, and validly, reserve the right to monitor electronic communications equipment, as the courts of appeals have recognized and as respondents do not dispute. Accordingly, the City's policy rests comfortably within any bounds that the Fourth Amendment might place on a government employer's formulation of policy to monitor the workplace.[3] A government employee can claim no expectation of privacy in electronic

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[3] For instance, this case does not present the sort of questions that would be raised by searches of employees' *own* accouterments in the physical workplace, such as "closed luggage," a "handbag," or a "briefcase"—three examples that Justice O'Connor suggested might fall outside the scope of a permissible policy on workplace searches, see *O'Connor*, 480 U.S. at 716.

equipment when the employer providing the equipment expressly rules out any such expectation.

a. As the court of appeals recognized, Pet. App. 29-30, federal courts broadly agree that employers may provide that the computers and other electronic equipment their employees use at work are not private. Courts have given effect to monitoring policies implemented in various ways. In some cases, the employers adopted a single written policy governing all computer use. See, *e.g.*, *United States* v. *Thorn*, 375 F.3d 679, 682 (8th Cir. 2004) (state agency's policy warned that "[e]mployees *do not* have any personal privacy rights regarding their use of [agency] information systems and technology"), vacated on other grounds, 543 U.S. 1112 (2005); *United States* v. *Angevine*, 281 F.3d 1130, 1132-1133, 1134 (10th Cir.) (state university's policy "reserved the right to randomly audit Internet use" or to investigate possible misuse and "explicitly caution[ed] computer users that information flowing through the University network is not confidential either in transit or in storage on a University computer"), cert. denied, 537 U.S. 845 (2002); *United States* v. *Simons*, 206 F.3d 392, 398 (4th Cir. 2000) (federal agency's policy "clearly stated that [the agency or its contractor] would 'audit, inspect, and/or monitor' employees' use of the Internet, * * * 'as deemed appropriate'"); accord *Bohach* v. *City of Reno*, 932 F. Supp. 1232, 1234-1235 (D. Nev. 1996) (similar policy as to city-issued pagers); see also *Leventhal* v. *Knapek*, 266 F.3d 64, 74, 75-77 (2d Cir. 2001) (Sotomayor, J.) (finding a factual dispute over whether the state employer "had placed Leventhal on notice that he should have no expectation of privacy in the contents of his office computer," but upholding the search as reasonable in any event). In other cases, government em-

ployers maintained an electronic "banner" or "splash screen" that warned the user each time he logged on to the computer system that his computer use was subject to monitoring. *Angevine*, 281 F.3d at 1133, 1134; *United States* v. *Monroe*, 52 M.J. 326, 330 (C.A.A.F. 2000).

Those decisions complement a line of cases similarly upholding government employers' authority to set the terms under which they will monitor other facilities that they make available to employees. For example, the courts have upheld a United States Postal Service (USPS) policy permitting searches of the lockers the USPS provides to its employees. See *American Postal Workers Union* v. *USPS*, 871 F.2d 556, 560-561 (6th Cir. 1989); *United States* v. *Broadus*, 7 F.3d 460, 463-464 (6th Cir. 1993); accord *United States* v. *Bunkers*, 521 F.2d 1217, 1219, 1220 (9th Cir.), cert. denied, 423 U.S. 989 (1975). Regardless whether an employee would have an expectation of privacy in an employer-provided locker in the absence of a policy, see note 2, *supra*, the employee can have no such expectation when the employer makes clear from the outset that it can inspect the locker.

b. Respondents have not argued that the Fourth Amendment forbids or renders ineffective an employer's clearly articulated policy of workplace monitoring. To the contrary, they have conceded that a government employer may specify that it reserves all rights to audit text messages (or similar communications) that employees send through an employer-provided system. See Pls.' Resp. to Pet. for Reh'g En Banc 12 n.3 (government policies, if adhered to in practice, "would negate or diminish an expectation of privacy"). That recognition of an employer's ability to monitor electronic communications under an established policy is appropriate. For at

least three reasons, employer-provided devices such as computers, pagers, and "smart" phones are precisely the type of workplace aid that employers have an important interest in regulating.

First, employers face unique risks from the use of networked devices, which require careful attention. Networked devices are frequently the targets of electronic attacks, designed to steal confidential information, seize control of a network, or distribute malicious software. See generally, *e.g.*, United States Computer Emergency Readiness Team, Dep't of Homeland Sec., *Cyber Threat Source Descriptions* (last visited Feb. 10, 2010) <http://www.us-cert.gov/control_systems/csthreats.html>. Employers may need to monitor the entire network to guard against such threats, because carving out "personal" information (even if practicable) creates too grave a vulnerability. When employees are using an employer's networked device for personal purposes, they pose a potential threat, intentionally or not, to the employer's entire network. Malicious software is just as likely—if not more likely—to be introduced to a network through a personal e-mail as a work-related one. And mobile devices can present the same dangers as traditional desktop computers. See, *e.g.*, United States Computer Emergency Readiness Team, Dep't of Homeland Sec., *Cyber Security Tip ST06-007: Defending Cell Phones and PDAs Against Attack* (2006) <http://www.us-cert.gov/cas/tips/ST06-007.html>; accord, *e.g.*, Yuki Noguchi, *Cell Phones Increasingly Attractive to Hackers*, Wash. Post, Nov. 26, 2004, at A1 <http://www.washingtonpost.com/wp-dyn/articles/A13361-2004Nov25.html>.

Second, and relatedly, the nature of electronic media (whether networked or not) makes it difficult to sepa-

rate work-related matters, over which the employer plainly has policymaking authority, from employees' personal matters. A single sector of a flash drive, a single "packet" of information arriving from the Internet, or even a single text or e-mail message may contain both. The reasons employers adopt auditing policies (such as to protect against malicious software that may be introduced via a flash drive, network, or some other means) thus may extend to all uses of a government-owned device, not just those identifiably related to work. See generally Office of Legal Counsel, United States Dep't of Justice, *Legal Issues Relating to the Testing, Use, and Deployment of an Intrusion-Detection System (EINSTEIN 2.0) to Protect Unclassified Computer Networks in the Executive Branch* (Jan. 9, 2009) <http://www.justice.gov/olc/2009/e2-issues.pdf> (*OLC Memorandum*).

Third, employees' personal use of a governmental employer's facilities may have legal effects upon the employer itself. Documents created by a public employee for his own use may nonetheless constitute public records that the employer is obliged by state or local open-records laws to preserve and disclose, as the City argues is true here. See Pet. Br. 35-40.[4] Conversely,

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[4] See, *e.g.*, *Flagg* v. *City of Detroit*, 252 F.R.D. 346, 355-356 (E.D. Mich. 2008) (text messages sent from city-owned device were public records under Michigan open-records law). Compare, *e.g.*, *Cowles Publ'g Co.* v. *Kootenai County Bd. of County Comm'rs*, 159 P.3d 896, 899-901 (Idaho 2007) (holding that e-mails between county employees, including personal e-mails, are "public records" under state open-records law if they relate to the public interest), with, *e.g.*, *Associated Press* v. *Canterbury*, No. 34768, 2009 WL 3805646 (W. Va. Nov. 12, 2009) (e-mails whose content is entirely personal are not public records). The federal Freedom of Information Act, 5 U.S.C. 552, generally does not require disclosure of purely personal e-mails.

employees' personal communications may reveal sensitive work-related information that the employer validly wishes to keep confidential. Employees' personal documents may also be relevant to the employer's ability to defend itself in litigation. See, *e.g.*, *O'Connor*, 480 U.S. at 713 (plurality opinion) (Dr. Ortega's employer seized his personal greeting card, book, and photograph, all later used as impeachment material); *Biby* v. *Board of Regents*, 419 F.3d 845, 850-851 (8th Cir. 2005) (employer successfully invoked policy specifically reserving the right to search employees' work computers to respond to discovery requests in litigation). For instance, to avoid liability for a hostile work environment created by its employees, an employer must promptly and effectively investigate complaints of harassment. See *Faragher* v. *City of Boca Raton*, 524 U.S. 775, 806-807 (1998). Such an investigation may well require review of employees' personal messages (including e-mail) sent using the company facilities. See, *e.g.*, *EEOC* v. *PVNF, L.L.C.*, 487 F.3d 790, 795, 798 (10th Cir. 2007) (e-mail between co-workers was evidence of hostile work environment). The employer therefore may have valid interests in monitoring the content of communications sent by its employees using facilities the employer provides.

For those compelling reasons, the overwhelming majority of the Nation's employers—including the United States and other public employers—have adopted policies to monitor activities on their electronic communications equipment. See *OLC Memorandum* 4-5; American Mgmt. Ass'n, *2007 Electronic Monitoring & Surveillance Survey* (Feb. 28, 2008) <http://www.amanet.org/

news/177.aspx>.[5] Consistent with these policies, many employers, including the City here, permit their employees to make modest personal use of office equipment. Pet. App. 153. Were this Court to hold that an employer could not monitor personal communications of employees pursuant to a clearly articulated policy, public employers would be left with only two options: either to bar *all* personal use of government-owned communications equipment, or to give over to employees a portion of the government's electronic resources and risk the damage to government networks that such loss of control might cause.

3. The City clearly and validly informed Quon that he would have no expectation of privacy in his text messages

Because the City clearly informed Quon, in advance, that it reserved the right to monitor the text messages sent through his City-issued pager, Quon had no reasonable expectation of privacy in those messages under the Fourth Amendment. The Policy, which by its terms governed e-mails, specified that such messages were "not confidential" or private; were City property; could be "monitor[ed] and log[ged]"; were "subject to 'access and disclosure' in the legal system and the media"; and, therefore, "should not be used for personal or confidential communications." Pet. App. 152-153. And after the City obtained the pagers, it informed Quon, both orally and in writing, that text messages sent through the pag-

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[5] Numerous federal agencies notify employees, each time they log onto a government computer or network, that "[y]ou have no reasonable expectation of privacy regarding any communications transmitted through or data stored on this information system." *OLC Memorandum* 6 n.5; see *id.* at 5.

ers "[we]re considered e-mail" and "would fall under the [Policy] as public information and eligible for auditing." J.A. 28, 30 (memorandum addressed to Quon, among others); see Pet. App. 48.[6]

The panel opinion in the court of appeals substantially agreed that the Policy applied to pagers. See Pet. App. 29. To be sure, Judge Wardlaw later suggested that "[t]he record [was] clear that the City had no official policy governing the use of the pagers." *Id.* at 127 (opinion concurring in denial of rehearing en banc). But as both the panel opinion and the district court recognized, Chief Scharf's memorandum, as well as statements made at the meeting he previously convened (see *id.* at 48; J.A. 30), informed Quon and other officers that text messages sent through the City-provided pagers were to be considered e-mail subject to the Policy. See Pet. App. 29, 88-89. Judge Wardlaw noted Quon's testimony that he did not recall learning at the meeting that text messages would be considered e-mail. *Id.* at 127. But the advice given there is memorialized in Chief Scharf's memorandum, J.A. 30, which is apparently uncontroverted. And in any event, the panel did not identify a factual dispute about whether Quon was aware of the Department's policy; it instead held Quon entitled to judgment as a matter of law. Pet. App. 28-29, 40.

In ruling for Quon, the panel relied in part on past practice: the panel noted that Quon's messages had never been reviewed before and that the Department had not received many requests for records under the California Public Records Act. Pet. App. 31, 32. But the extent to which the City had previously exercised its

[6] Indeed, it appears that the pagers received e-mail; the record contains a number of messages from Trujillo's OntarioPolice.org e-mail address to Quon's pager. See, *e.g.*, C.A. Supp. E.R. 514-515.

authority to read officers' text messages, or the public its right to demand city records, is not relevant to the question. So long as the City and public possessed such authority, Quon could not have an expectation of privacy in his text messages that would render ineffective the City's enforcement of its Policy.

This Court held in *Smith, supra*, that a practice of forbearance does not create a reasonable expectation of privacy where none otherwise would exist. In *Smith*, the defendant conceded that a telephone number he dialed would not be private if the telephone company automatically recorded the dialed-number information. 442 U.S. at 744. He argued, however, that he had a reasonable expectation of privacy in the local phone number he dialed, because "telephone companies, in view of their present billing practices, usually do not record local calls." *Id.* at 745. The Court rejected that argument, holding that "[t]he fortuity of whether or not the phone company in fact elects" to record a number dialed "does not, in our view, make any constitutional difference." *Ibid.* What mattered was that Smith "voluntarily conveyed to [the phone company] information that it had facilities for recording and that it was free to record," whether or not the company elected to record it for any particular call. *Ibid.* Similarly, a criminal who entrusts information to another person cannot claim an invasion of privacy if that person is or becomes a police informant—whether or not the informant has ever turned state's evidence before. See *United States* v. *White*, 401 U.S. 745, 752 (1971) (plurality opinion). Thus, the City's track record of conducting audits is irrelevant to the question whether Quon could reasonably consider private the messages sent through his City-issued pager. The Policy made clear that he could not.

4. A nonpolicymaking individual such as Lieutenant Duke could not vitiate the City's official policy or give Quon a reasonable expectation of privacy in his text messages

In sustaining Quon's Fourth Amendment claim, the panel relied primarily on Lieutenant Duke's purported informal amendment of the City's monitoring policy. See also Pet. App. 127 (Wardlaw, J., concurring in denial of rehearing en banc) (opining that Lieutenant Duke's policy was "express and specific"). That conclusion is legally and factually flawed.

a. Lieutenant Duke had no authority to set City policy. Indeed, the panel acknowledged as much. Pet. App. 31 (agreeing that "Lieutenant Duke was not the official policymaker, or even the final policymaker"). The panel erred by treating him as having the power to revoke or nullify the Policy for Fourth Amendment purposes.[7]

This Court has often had occasion to determine whether an official makes policy for the municipality that employs him, such that the employer is vicariously liable for his actions. Under none of those cases would Lieutenant Duke be thought capable of reversing the City's policy and announcing his own in its place. "When an official's discretionary decisions are constrained by policies not of that official's making, *those policies*, rather than the subordinate's departures from them, *are the act of the municipality*." *City of St. Louis* v. *Praprotnik*, 485 U.S. 112, 127 (1988) (plurality opinion)

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[7] To be sure, Lieutenant Duke voiced the initial admonition that text messages sent through the City-provided pagers would be considered e-mail for purposes of the Policy. But Lieutenant Duke did not *set* that policy, and it was the Chief of Police who memorialized the advice in minutes of the meeting, issued under the Chief's signature. J.A. 28, 30.

(emphasis added); see also, *e.g.*, *Jett* v. *Dallas Indep. Sch. Dist.*, 491 U.S. 701, 738 (1989) (treating the *Praprotnik* plurality opinion's analysis of "final policymaking authority" as controlling). "[T]he authority to make municipal policy is necessarily the authority to make *final* policy," and Lieutenant Duke lacked any authority to make final policy. *Praprotnik*, 485 U.S. at 127 (plurality opinion). At most, Lieutenant Duke had some discretion in how he implemented the Policy with respect to pagers. Such interstitial discretion does not transform an employee into a policymaker. See, *e.g.*, *id.* at 130; *id.* at 139-140 (Brennan, J., concurring in the judgment).

b. Even if the Ninth Circuit were right to treat Lieutenant Duke's practice (rather than the written policies of duly authorized policymakers) as the controlling "operational reality," Pet. App. 30, petitioners should still prevail. Lieutenant Duke's actions did not alter the entirety of the Policy; he specified only how he would choose to handle an officer's overage charges (*i.e.*, he would accept an officer's personal check without conducting an audit when the officer admitted personal responsibility for the full amount of the overage). But the police department's interest in monitoring pager use extends far beyond allocating overage charges—as the Policy made clear. See *id.* at 153. There is no evidence that Lieutenant Duke stated or implied that paying the overage charges would confer an absolute immunity from the Policy.

Moreover, only a few months passed between the City's acquisition of the pagers (when Lieutenant Duke developed his practice of collecting for overages) and the Chief's directive to conduct an audit of the two pagers with the greatest overages (when Lieutenant Duke

stopped his practice). See pp. 3-4, *supra*. A brief period of underenforcement by a single subordinate officer does not detract from the force of a policy. Cf. *Monell* v. *Department of Soc. Servs.*, 436 U.S. 658, 691 (1978) (to "constitute a 'custom or usage' with the force of law," a practice must be "permanent and well settled") (quoting *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 168 (1970)).

c. Tying Fourth Amendment protection to representations made, expressly or implicitly, by lower-level employees would severely compromise a government employer's ability to safeguard its network or investigate its employees' on-the-job activities. Because auditors often will not know about these representations, they will not be able to assess whether their behavior comports with the Fourth Amendment. To take an obvious and likely example, investigators might rely on a monitoring policy in requesting an audit, only to learn later that a help-desk staffer had nullified that policy orally. The uncertainty that the court of appeals' unprecedented rule would yield may create a powerful disincentive to conduct searches even when clearly authorized by official workplace policy. And under that rule, any search authorized by an official policy may well become the subject of lengthy, fact-intensive litigation. If any non-policymaking employee can negate an official policy by the kinds of actions that Lieutenant Duke took here, then a government's compliance with such an official policy will not suffice to support a search.

B. The Search Was Not Rendered Unreasonable Merely Because It Examined Content

After holding that Quon had a reasonable expectation of privacy in his text messages, the court of appeals concluded that the search was unreasonable in scope be-

cause there were "less intrusive methods" available. Pet. App. 35 (citation omitted). Whether or not the panel (as Judge Ikuta contended and Judge Wardlaw denied) required the use of the *least* intrusive means,[8] the panel clearly held that if the City could achieve its desired goal without looking at Quon's private messages, the City was required to do so. See *id.* at 35-36. That analysis is inconsistent with *O'Connor* and with this Court's other cases.

The Fourth Amendment's "special needs" doctrine does not impose a rigid distinction between "private material" and "other material."[9] As Justice O'Connor explained in *O'Connor*, the scope of a search is to be assessed by looking at the government's legitimate need, 480 U.S. at 726 (plurality opinion); accord *id.* at 732 (Scalia, J., concurring in the judgment), not just at the "private" nature of the material uncovered. The court of appeals' decision is in tension with this approach; indeed, under the court of appeals' reasoning, the *O'Connor* Court would not have needed to remand to the Ninth Circuit, because the search at issue in that case indisputably encompassed several of Dr. Ortega's personal items. See *id.* at 713-714 (plurality opinion).

Properly understood, the Fourth Amendment's special-needs doctrine requires only that the purpose of the search be legitimate and that the scope be reasonably related to its object. *O'Connor*, 480 U.S. at 726

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[8] Judge Ikuta was correct in pointing out that this Court has definitively ruled out the notion that a "special needs" search requires use of the least restrictive means. Pet. App. 145 (citing, inter alia, *Board of Educ.* v. *Earls*, 536 U.S. 822, 837 (2002)).

[9] To be sure, if an inspection does not trench on a reasonable expectation of privacy at all, then the Fourth Amendment is not implicated.

(plurality opinion) (citing *New Jersey* v. *T.L.O.*, 469 U.S. 325, 342 (1985)); accord, *e.g.*, *Michigan Dep't of State Police* v. *Sitz*, 496 U.S. 444, 455 (1990). That standard is amply met in this case. As this Court has recognized, "judges engaged in *post hoc* evaluations of government conduct 'can almost always imagine some alternative means by which the objectives of the [government] might have been accomplished.'" *Skinner* v. *Railway Labor Executives Ass'n*, 489 U.S. 602, 629 n.9 (1989) (brackets in original) (quoting *United States* v. *Montoya de Hernandez*, 473 U.S. 531, 542 (1985)). But here, the imagined means that the panel offered all depended on Quon's accurate and timely cooperation, see Pet. App. 35-36, which the City could reasonably think would not be forthcoming. And the actual means that the City used was appropriately limited in scope in view of its object; indeed, it involved review limited to a single billing period. *Id.* at 54.

C. Because The City Validly Obtained Messages Delivered To Quon, The Authors Of Those Messages Suffered No Constitutional Injury

Because the City did not violate Quon's Fourth Amendment rights in obtaining the text messages from the Arch account for Quon's City-issued pager, individuals who sent those text messages to Quon likewise have no claim. The panel erred by concluding that senders retained a privacy interest in those text messages once delivered. Like a letter-writer or a gift-giver, a text-message-sender loses a cognizable privacy interest once the message reaches the recipient, because other people can lawfully obtain the message from the recipient. The question with respect to Trujillo, Florio, and Jerilyn Quon therefore is not whether "users of text messaging

services * * * have a reasonable expectation of privacy in their text messages stored on the service provider's network," Pet. App. 24. Rather, it is whether *senders* of text messages have a reasonable expectation of privacy in their text messages once they arrive at their destination. They do not.[10]

1. The City did not request the transcript of Quon's text messages until a few days after the relevant billing period had ended. Accordingly, it did not intercept real-time messages queued for delivery to Quon; it received transcripts only of messages that Quon had already sent or received. Although both the panel and respondents emphasize that the City obtained the messages from Arch rather than from Quon, the difference is immaterial: once each message was delivered, the City could have gained access to it by requiring Quon to hand over his City-issued pager and reading that message in the pager's memory.[11] Any distinction between those two methods of retrieving the identical information is constitutionally irrelevant. Cf. *Smith*, 442 U.S. at 744-745 (caller had no expectation of privacy in phone number dialed, regardless whether that information was remem-

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[10] Senders who retain a copy of each message they send may have an expectation of privacy in those copies, depending on where and how the copies are stored. Quon's copies of messages he sent were stored on the City's paging system, and he therefore had no expectation of privacy in his sent messages, for the reasons discussed above.

[11] The record does not disclose whether Quon deleted any of the relevant text messages from his handheld pager. But the Policy warned him that "[d]eletion of * * * electronic information may not fully delete the information from the system." Pet. App. 153. And in any event, the length of time that Quon chose to store a particular message on his handheld pager is irrelevant to whether Jerilyn Quon, Florio, or Trujillo had a reasonable expectation of privacy in the message once transmitted.

bered by a human operator, recorded in the phone company's billing records, or captured by a pen register).

Moreover, the City could retrieve messages from Arch only to the extent they were sent through a City-issued pager. See Pet. App. 8-9. Florio and Jerilyn Quon, for instance, had pagers that were *not* paid for by the City, C.A. Supp. E.R. 303, 307, and the City could not have obtained (and did not try to obtain) the transcripts of messages between them alone. Thus, the City obtained messages from Jerilyn Quon, Florio, and Trujillo only because those messages were in Quon's possession, through his City-issued pager.[12]

2. Because the City obtained the messages from the Arch account for Quon's pager, and did so in a manner consistent with the Fourth Amendment (see Parts A and B, *supra*), it did not invade any cognizable Fourth Amendment right of the three other respondents. Once a message is received—whether via paper or electronically—the sender no longer has a reasonable expectation under the Fourth Amendment that it will be kept confidential.[13] Although other sources of law (such as evidentiary privileges) may protect a message even once it reaches the hands of the recipient, the sender no longer has a constitutional right to insist that the message remain private.

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[12] The City could separately have obtained messages sent through Trujillo's City-issued pager, but did not.

[13] Indeed, the court of appeals recognized that "[a]bsent an agreement to the contrary, Trujillo, Florio, and Jerilyn Quon had no reasonable expectation that Jeff Quon would maintain the private nature of their text messages." Pet. App. 28.

This Court has long held that when one person voluntarily discloses information to another,[14] the first person loses any cognizable interest under the Fourth Amendment in what the second person does with the information. See *United States* v. *Miller*, 425 U.S. 435, 443 (1976); *Couch* v. *United States*, 409 U.S. 322, 325 (1973); *White*, 401 U.S. at 752 (plurality opinion); *Hoffa* v. *United States*, 385 U.S. 293, 302-303 (1966). For Fourth Amendment purposes, the same principle applies whether the recipient intentionally makes the information public or hands it over as part of a constitutionally reasonable search. Thus, when Quon received text messages from the other three respondents addressed to his government pager, these three senders assumed the risk that Quon would give those messages to the police; leave them somewhere freely accessible to the police; or place them somewhere subject to a constitutionally valid search. If the City could constitutionally obtain messages from Quon (or from the Arch account of Quon's pager), that ends the analysis: the Fourth Amendment does not give greater protection to messages Quon received from the respondents than it does to Quon's retained copies of messages he sent himself.

In these respects, text messages are no different from letters or e-mails. (The panel recognized this similarity but not the consequences of it.) Although the Fourth Amendment protects sealed letters in transit, "if a letter is sent to another, the sender's expectation of

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[14] "Another" refers to an ultimate recipient, not (for example) a commercial carrier. See *United States* v. *Jacobsen*, 466 U.S. 109, 114 (1984). Thus, for instance, no party has argued in this case that respondents lost all expectation of privacy the moment their messages were passed to Arch for delivery—only that they had no expectation of privacy once Quon received the messages.

privacy ordinarily terminates upon delivery." *United States* v. *King*, 55 F.3d 1193, 1196 (6th Cir. 1995) (citations omitted). The same rule applies to e-mail users, who lack "a legitimate expectation of privacy in an e-mail that had already reached its recipient." *Guest* v. *Leis*, 255 F.3d 325, 333 (6th Cir. 2001). See also *SEC* v. *Jerry T. O'Brien, Inc.*, 467 U.S. 735, 743 (1984) ("when a person communicates information to a third party even on the understanding that the communication is confidential, he cannot object if the third party conveys that information or records thereof to law enforcement authorities."); *United States* v. *Heckencamp*, 482 F.3d 1142, 1146 (9th Cir.) (an "expectation of privacy may be diminished" for "transmissions over the Internet or e-mail that have already arrived at the recipient") (citation omitted), cert. denied, 552 U.S. 1023 (2007).

The panel erred in holding that the government cannot obtain a text message without the consent of either the sender or the recipient. Consent is not the only way the City could validly obtain the messages involved in this case, just as consent is not the only way police officers may enter a home or search a container. In this case, because the messages were sent to Quon's City-provided pager, the City validly obtained these messages pursuant to a workplace search. The other respondents had no further rights in those messages.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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FEBRUARY 2010

AMICUS CURIAE BRIEF

No. 08-1332

IN THE

Supreme Court of the United States

CITY OF ONTARIO, CALIFORNIA, *et al.*,
Petitioners,

v.

JEFF QUON, *et al.*,
Respondents.

On Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICI CURIAE*

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) is a federation of 57 national and international labor organizations with a total membership of 11.5 million working men and women. This case concerns the extent to which the Fourth Amendment protects public employees from unreasonable work-related searches by their public employers.

The parties have consented to the filing of this brief. No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus*, made a monetary contribution to the preparation or submission of this brief.

Many of the employees represented by AFL-CIO affiliates are public employees. The AFL-CIO has, therefore, frequently filed *amicus curiae* briefs in cases affecting the constitutional rights of public employees. *See, e.g.*, *Garcetti v. Ceballos*, 547 U.S. 410, 413 n.* (2006).

SUMMARY OF ARGUMENT

In *O'Connor v. Ortega*, 480 U.S. 709 (1987), this Court set forth the standards for determining whether a public employer's work-related search of a public employee's workplace violates the Fourth Amendment. Under *Ortega*, a public employer violates the Fourth Amendment by conducting a search that violates an employee's reasonable expectation of privacy, if the scope of the search is not reasonably related to or is excessively intrusive in light of the purpose of the search.

I. The City of Ontario's search of the text messages sent and received via Sergeant Jeff Quon's pager infringed Quon's reasonable expectation of privacy. Under *Ortega*, a public employee's reasonable expectation of privacy is determined by the "operational realities of the workplace." The relevant "operational realities" regarding Quon's use of his pager are: i) the City required Quon to have the pager on his person at all times, even when off duty; ii) the City expressly gave him permission to use the pager for personal messages, charging him for that use; and iii) the person the City placed in charge of auditing the pagers told Quon that his messages would not be audited so long as Quon paid for potential personal use by reimbursing the City for any monthly overage. These "operational realities" are materially similar to those that caused this Court in *Ortega* and several lower courts applying *Ortega*'s teaching to conclude that government employees had a reasonable expectation of privacy with regard to personal materials stored in various types of government-issued workplace equipment.

II. The City's search of the contents of Sergeant Quon's pager messages was excessively intrusive in light of the objective of the search. Under *Ortega*, the reasonableness of a public employer's search conducted for a noninvestigatory work-related purpose depends on whether the search is reasonably related to and not unduly intrusive in light of that purpose. The objective of the City's search of Quon's pager was to determine whether the City's pager contract provided a sufficient number of paid-for characters to cover official use. This objective could have been achieved without reviewing the contents of every message on Quon's pager, including highly personal messages sent to or received from obviously private pagers. The City's search was, therefore, unreasonable and in violation of Quon's right to privacy under the Fourth Amendment.

ARGUMENT

The question presented by this case is whether the City of Ontario, California, violated the Fourth Amendment by conducting a search that consisted of printing and reading the contents of personal text messages sent and received via pager by one of its employees, Sergeant Jeff Quon. The City had supplied the pager to Quon and required that he have it on his person at all times, including times when he was off duty. The City expressly authorized Quon to send and receive personal messages via the pager, and the official in charge of the City's pager program assured Quon that his personal pager messages would not be monitored so long as Quon paid for usage in excess of the monthly allotment of characters covered by the flat monthly fee paid by the City to its outside wireless communications provider. In this context, the court below properly held that the City's inspection of Quon's personal messages was an unreasonable search under this Court's decision in *O'Connor v. Ortega*, 480 U.S. 709 (1987). Pet. App. 35-36.

In *O'Connor v. Ortega*, this Court unanimously "reject[ed] the contention . . . that public employees can never have a reasonable expectation of privacy in their place of work" and held that "[i]ndividuals do not lose Fourth Amendment rights merely because they work for the government instead of a private employer." 480 U.S. at 717. While a five member majority of the *Ortega* Court held that "a public employer's work-related search of its employee's [workplace] offices, desks, or file cabinets" is not subject to the Fourth Amendment's ordinary warrant and probable cause requirements, *id.* at 720-721, those same Justices made clear that the "[c]onstitutional protection against *unreasonable* searches by the government does not disappear merely because the government has the right to make reasonable intrusions in its capacity as employer." *Id.* at 717-18 (plurality opinion), 731 (Scalia, J., concurring) (emphasis in original).

Ortega prescribes a two-step analysis for determining whether a government employer's work-related search violates the Fourth Amendment. First, it is necessary to determine whether the search "infringed 'an expectation of privacy that society is prepared to consider reasonable.'" 480 U.S. at 715, quoting *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). Once it has been determined that the employee "had a reasonable expectation of privacy" that was infringed by the search, it is necessary to determine whether the search was "reasonable" by "balanc[ing] the invasion of the employees' legitimate expectations of privacy against the government's need for supervision, control, and the efficient operation of the workplace." *Id.* at 719-20.

In what follows, we first show that the courts below correctly determined that Quon had a reasonable expectation of privacy with regard to the contents of his personal text messages on his pager. We then show that the

court of appeals was correct in concluding that the City's search of Quon's personal text messages was "excessively intrusive in light of the noninvestigatory object of the search." Pet. App. 36.

I. SERGEANT QUON HAD A REASONABLE EXPECTATION OF PRIVACY IN THE PERSONAL TEXT MESSAGES HE SENT AND RECEIVED VIA HIS PAGER

"[I]n order to claim the protection of the Fourth Amendment, [an individual] must demonstrate that he personally has an expectation of privacy in the place searched, and that his expectation is reasonable." *Minnesota v. Carter*, 525 U.S. 83, 88 (1998). "Neither party disputes that Quon . . . had a subjective expectation of privacy in the text-messages sent or received on the pager[]." Pet. App. 88 n. 6. And the highly personal nature of the text messages clearly demonstrates that Quon strongly believed that their contents were private and not subject to public disclosure. The City does dispute, however, the findings of both courts below that Quon's expectation was objectively reasonable.

A. The plurality opinion in *Ortega* emphasized that "when an intrusion is by a supervisor" into a work-related area, the reasonableness of "[p]ublic employees' expectations of privacy" can be affected by "actual office practices and procedures, or by legitimate regulation." 480 U.S. at 717. Thus, the focus of the "reasonable expectations" inquiry must be the "operational realities of the workplace." *Ibid.*

In this case, the "operational realities" are: i) the City required Quon to have the pager on his person at all times, even when off duty; ii) the City expressly gave him permission to use the pager for personal messages, charging him for that use; and iii) the person the City placed in charge of auditing the pagers told Quon that his messages

would not be audited so long as Quon paid for potential personal use by reimbursing the City for any monthly overage. Given those "operational realities," the conclusion that Quon's expectation of privacy was reasonable follows directly from *Ortega*.

The one thing in *Ortega* that all nine Justices agreed on was "that Dr. Ortega had a reasonable expectation of privacy in his [hospital] desk and file cabinets." 480 U.S. at 718. Three aspects of the "operational realities of [Ortega's] workplace," *id.* at 717, led the plurality – which took the most restrictive position – to this conclusion. First, "Dr. Ortega did not share his desk or file cabinets with any other employees." *Id.* at 718. Second, "he kept materials in his office, which included personal correspondence, medical files, correspondence from private patients unconnected to the Hospital, personal financial records, teaching aids and notes, and personal gifts and mementos." *Ibid.* Third, "there was no evidence that the Hospital had established any reasonable regulation or policy discouraging employees such as Dr. Ortega from storing personal papers and effects in their desks or file cabinets." *Id.* at 718-19. In each of these three respects, the "operational realities" of Quon's use of his employer-provided pager are closely analogous to Ortega's use of his hospital desk and file cabinets.

First, Quon "did not share his [pager] with any other employees." *Ortega*, 480 U.S. at 718. Quon's pager was assigned to him exclusively. Access to the pager by another employee was, in fact, impossible, because the City required Quon to keep the pager on his person at all times, including times when he was not on duty. J.A. 52.

Second, Quon "kept [personal] materials," in the form of personal text messages, on his pager. 480 U.S. at 718. And, Quon actually paid the City for his personal use of the pager. Pet. App. 8.

Third, "there was no evidence that the [City] had established any reasonable regulation or policy discouraging employees such as [Quon] from [using their City-provided pagers for] personal [messages]." *Ortega*, 480 U.S. at 719. To the contrary, the showing that the City "allowed, condoned, and even encouraged" its employees' "use[of] the pagers for personal matters" was so strong that the district court ruled a search of employee pager messages conducted for the purpose of uncovering such personal use would not be "justified at the inception," because "the search would not have revealed misconduct[but] rather . . . would have uncovered conduct permitted [by the City] to occur." Pet. App. 98-99.

B. In arguing that Quon did not have a reasonable expectation of privacy in personal messages on his pager, the City relies heavily on the point that "Sergeant Quon was informed that 'the city owned and issued alphanumeric pagers were considered e-mail, and that those messages would fall under the City's policy as public information and eligible for auditing.' J.A. 30, 61." Pet. Br. 33-34. The circumstances and content of that communication completely undermine the City's reliance on this point.

The statement in question was made by Lieutenant Steven Duke, "the person in charge of the use and provision of the department's electronic equipment," Pet. App. 18, in the course of a broader discussion encompassing many items at a general workplace meeting held on April 29, 2002. J.A. 28-32. During this same time period, Duke specifically informed Quon that Duke would not audit Quon's pager messages if Quon reimbursed the City for charges due to Quon's use of the pager in excess of the City's normal monthly allotment under its contract. Pet. App. 50; J.A. 81. Duke's statement at a group meeting that pager messages were generally "*eligible* for auditing" does not contradict Duke's specific assurance to Quon

that his pager messages *would not in fact* be audited if Quon reimbursed the City for overage charges. The City cannot claim that it was unreasonable for Quon to rely on Duke's statements made to Quon personally regarding the privacy of Quon's text messages, when it is Duke's statements to a group meeting that the City relies upon to establish the application of the computer usage policy to pagers.

Second, the City also relies on the general "Computer Usage, Internet and E-Mail Policy" that was distributed to City employees in late 1999. Pet. App. 151-55. That reliance is doubly flawed. At the threshold, that policy does not expressly refer to, much less purport to govern, pagers, which would not be provided to City employees until two years later. Pet. App. 15. And, even if the policy were understood to cover text messages sent via pager, the policy's general declarations – that "[t]he City of Ontario reserves the right to monitor and log all network activity including e-mail" and that "[u]sers should have no expectation of privacy or confidentiality when using these resources," Pet. App. 152 – do not negate the reasonable expectation of privacy created by the post-2001 "operational realities of the workplace" regarding pagers. *Ortega*, 480 U.S. at 717. Aside from "the person in charge of the use and provision of the department's electronic equipment," Pet. App. 48, specifically assuring Quon that his pager messages would not be audited, Pet. App. 50, the "operational reality" was that – unlike e-mail, which was run on a city-operated network and thus could be directly audited by the City – the pagers communicated through an outside, privately-run network, which the City could not directly audit, and, prior to the incidents that gave rise to this case, the City had never requested access to pager messages from the outside provider. J.A. 62, 72, 77.

Finally, the City argues that the "potential for public

review" under the California Public Records Act "eliminated any *legitimate* expectation of privacy" Quon may have had regarding his personal text messages. Pet. Br. 40 (emphasis in original). *See id.* at 35-40. But that Act has no application to Quon's personal pager messages. The Act requires disclosure only of "public records," which it defines as records "containing information relating to the conduct of the public's business." Cal. Gov't Code § 6252(e). What is more, even if Quon's personal messages could somehow be considered "relat[ed] to the conduct of the public's business," they would be subject to the exemption for records "the disclosure of which would constitute an unwarranted invasion of personal privacy." *Id.* § 6254(c). *See also id.* § 6250 (expressing the legislature's concern with "the right of individuals to privacy").

C. Against that background, it is not surprising that the lower court decisions cited by the City as supporting its argument that the "operational realities of the workplace" here negate any reasonable expectation of privacy provide no such support. Pet. Br. 34-35. In *United States v. Angevine*, 281 F.3d 1130, 1132-33 (10th Cir. 2002), the "operational realities" were: i) that the employer's computer use policy stated that the employer "reserves the right to view or scan any file or software stored on the computer or passing through the network, and will do so periodically" and that "[t]he University cannot guarantee confidentiality of stored data;" ii) that the employer displayed a "splash screen" visible to computer users every time they turned on the computer informing the users of the university's right to audit or investigate violations of law or the computer use policy; and iii) that the university did, in fact, regularly audit computer use. *Id.* at 1133-34. Similarly, in *United States v. Simons*, 206 F.3d 392, 395-98 (4th Cir. 2000), the government employer: i) explicitly restricted use of an employee's computer to

government business; ii) clearly informed employees of its policy to "'audit, inspect, and/or monitor' [employees'] use of the Internet, including all file transfers, all websites visited, and all e-mail messages, 'as deemed appropriate;'" and iii) did, in fact, regularly conduct such monitoring.

Thus, the cases relied upon by the City involved clear, consistent policy statements regarding monitoring of employees' electronic communications that were directly applicable to the employee use at issue and were actually implemented by the employers. By contrast, the most clear and direct advice the City gave Quon regarding his personal pager messages was that he could expect them to remain private, advice which was consistent with the City's actual practice of *not* auditing pager messages.

In contrast, in the lower court cases in which the "operational realities" were similar to the realities in this case, the courts have ruled that the employees did have a reasonable expectation of privacy. In *Leventhal v. Knapek*, 266 F.3d 64, 74 (2d. Cir. 2001), the Second Circuit held that public employees have a reasonable expectation of privacy in work computers assigned for their exclusive use, so long as any employer access is not "frequent, widespread, or extensive." In this regard, the Second Circuit concluded that "infrequent and selective search[es] for maintenance purposes or to retrieve a needed document, justified by reference to the 'special needs' of employers to pursue legitimate work-related objectives, do[] not destroy any underlying expectation of privacy that an employee could otherwise possess in the contents of an office computer." *Ibid.*

In *United States v. Slanina*, the Fifth Circuit rejected the government's argument that a city employee did not have a reasonable expectation of privacy in his office and computer because other employees could have accessed his private office with a master key, computer personnel

regularly accessed his computer to upgrade software, and the computer was city property. 283 F.3d 670, 676-677 (5th Cir. 2002). The Fifth Circuit based its conclusion that the employee had a reasonable expectation of privacy on the fact that his office was private, and although co-workers occasionally had access to the office, it was not "so open to fellow employees or the public that no expectation of privacy is reasonable." *Id.* at 676 (quoting *Ortega*, 480 U.S. at 718). Access to the employee's computer by other employees was not "frequent, widespread, or extensive" enough to defeat a reasonable expectation of privacy in the computer's contents. *Id.* The city's ownership of the computer was not dispositive given the fact that the city had no official policy preventing employees from storing personal information on it or putting employees on notice that their computer use would be monitored. *Id.*

And, in *United States v. Long*, 64 M.J. 57, 64 (C.A.A.F. 2006), the Court of Appeals for the Armed Forces held that a Marine lance corporal had a reasonable expectation of privacy in personal e-mails she sent on a Department of Defense computer at her workstation at Marine Corps Headquarters. This conclusion was reached despite the unique nature of the military workplace and the fact that a "log-on banner" was displayed every time the lance corporal logged on to the network, notifying her that the network was monitored and that use of the computer constituted consent to monitoring. *Id.* at 60. The factors supporting a reasonable expectation of privacy included the fact that e-mail accounts were password protected and the fact that monitoring of the system was limited to certain conditions. The network administrator testified that "it was general policy to avoid examining e-mails and their content because it was a 'privacy issue.'" *Ibid.* It was also significant that the sending and receiving of limited personal e-mails was

condoned and that light use of the system for personal messages was considered authorized use under the written policy in effect at the Headquarters. *Id.* at 64.

* * *

In sum, "the operational realities of [Quon's] workplace" were materially similar to the "operational realities" that led the courts in *Ortega*, *Leventhal*, *Slanina*, and *Long* to conclude that the government employees in those cases had a reasonable expectation of privacy with regard to personal materials stored in various types of government-issued workplace equipment.

II. THE SCOPE OF THE POLICE DEPARTMENT'S SEARCH OF QUON'S PERSONAL TEXT MESSAGES WAS NOT REASONABLY RELATED TO ITS OBJECTIVE AND WAS EXCESSIVELY INTRUSIVE IN LIGHT OF ITS PURPOSE

In *Ortega*, this Court held "that public employer intrusions on the constitutionally protected privacy interests of government employees for noninvestigatory, work-related purposes, as well as for investigations of work-related misconduct, should be judged by the standard of reasonableness under all the circumstances." *Ortega*, 480 U.S. at 725-26. To pass "this reasonableness standard, both the inception and the scope of the intrusion must be reasonable." *Id.* at 726.

A search is reasonable at its inception if an employer has reasonable grounds to believe "that the search will turn up evidence that the employee is guilty of work-related misconduct, or that the search is necessary for a noninvestigatory work-related purpose." *Ortega*, 480 U.S. at 726. And a search is reasonable "in its scope when 'the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of

. . the nature of the [misconduct or the noninvestigatory work-related purpose]." *Ibid.* (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 342 (1985)). *See Skinner v. Ruy. Labor Executives' Assn.*, 489 U.S. 602, 625 (1989) ("special needs" search must "not constitute an unduly extensive imposition on an individual's privacy").

A. In this case, a jury found, by a special verdict, that the City searched the contents of Quon's pager "[t]o determine the efficacy of the existing character limits to ensure that officers were not being required to pay for work-related expenses." Pet. App. 119. The district court concluded that a search conducted for this noninvestigatory work-related purpose would be reasonable at its inception, because "the audit was done for the benefit of (not as a punishment against) the officers who had gone over the monthly character limits." Pet. App. 99. The Ninth Circuit agreed that "the purpose [of] ensur[ing] that officers were not being required to pay for work-related expenses . . . [wa]s a legitimate work-related rationale." Pet. App. 34.

The Ninth Circuit went on to hold that "the search was *not* reasonable in scope" on the grounds that "review[ing] the contents of all [of Quon's] messages, work-related and personal . . . was excessively intrusive in light of the noninvestigatory object of the search." Pet. App. 34 & 36 (emphasis added). In this regard, the Ninth Circuit found that the City could have easily limited its search in a way that would have allowed it to "verify the efficacy of the 25,000 character limit . . . without intruding on [Quon's] Fourth Amendment rights." Pet. App. 35. The Ninth Circuit's conclusion is clearly correct.

To audit Quon's official use of his pager, the City simply "review[ed] the contents of the pager transmissions to determine if the usage was on duty or off duty" without "consider[ing] whether there was a less intrusive means

of conducting the audit." Pet. App. 53 (quotation marks and brackets omitted). The critical point here is that, given the purpose of the search, the City had no reason to "actually look at the transcripts of [all] the text-messages." Pet. App. 101. Rather, the City could have easily limited its search by first separating text messages that were obviously personal from those that were possibly official and then reviewing the content of only the latter.

In the first place, simply "[l]ooking at the telephone numbers dialed by the officers" on their official pagers would have provided the City with the "means of determining whether the person who was paged was a co-worker" using an official pager. Pet. App. 102. Messages to or from a personal pager could not possibly concern official business, and thus the City had no reason to read such personal messages. The most personal of the pager messages at issue were those between Quon and his wife or his girlfriend, and both "were using their own personal pagers" in communicating with Quon. Pet. Br. 62, citing Ninth Circuit S.E.R. 303-04, 307. The City's review of the transcripts of messages between Quon and these obviously unofficial pagers had no relation to determining the number of characters contained in official communications. And, the City's completely unnecessary review of the messages between Quon's pager and his wife and his girlfriend's personal pagers was highly intrusive.

Even with respect to messages between Quon's pager and other official pagers, the City could have further tailored its search by providing Quon with a list of communications between his pager and other City-provided pagers and asking him to identify those messages that were possibly of an official nature. Quon would have had an incentive to identify all official messages, because doing so would have been "for the benefit of . . . the officers." Pet. App. 99. He would have had little incentive to

misidentify possibly official messages as personal – other than protecting against the disclosure of some highly personal messages. And, this incentive to undercount official messages could have been completely eliminated by allowing Quon to first review the transcripts himself so that he could separate out purely personal communications before the transcripts were turned over to a City supervisor for inspection.

In sum, the City could have achieved its objective of determining whether the existing character limit under its pager contract was sufficient to cover the usual number of official text messages by first limiting its search to messages to or from official telephone numbers – which by itself would have substantially reduced the intrusion on Quon's privacy – and then further limiting its search to those messages that Quon identified as official in nature. Instead, the City began its search by using the most intrusive means, reviewing the actual contents of all messages sent or received by Quon's pager.

B. The Ninth Circuit's conclusion that the scope of the City's search was unreasonable is supported by comparison with the manner in which the New York Department of Transportation conducted the search found reasonable in *Leventhal v. Knapek*, 266 F.3d 64 (2d Cir. 2001), and with the manner in which the University of Nebraska conducted the search found reasonable in *Biby v. Board of Regents of the University of Nebraska at Lincoln*, 419 F.3d 845 (8th Cir. 2005).

In *Leventhal v. Knapek*, the Second Circuit held that "the scope of the searches" conducted by the New York Department of Transportation on an employee's office computer "was not 'excessively intrusive in light of the nature of the misconduct.' [*Ortega*, 480 U.S.] at 726," precisely because the searches were conducted in stages with each stage calibrated to intrude no further than necessary to

achieve the employer's legitimate purpose. 266 F.3d at 76. In the first stage of the search – which was occasioned by the DOT's suspicion that Leventhal had loaded unauthorized software on his work computer to use for his private tax practice – "the DOT investigators printed out a list of file names found on Leventhal's office computer" but "did not run any program or open any files" and "limited their search to viewing and printing file names that were reasonably related to the DOT's need to know whether Leventhal was misusing his office computer." *Id.* at 75-76. In the next stage of the search, the investigators focused on files that they "reasonably suspected . . . were part of [an unauthorized] tax program" based on the file names. *Id.* at 76. At the subsequent stages, the "searches were limited to copying onto a laptop computer the 'PPU' directories that they later identified as referring to 'Pencil Pushers,' a tax preparation program, and the 'Morph' directories, pertaining to a graphics program, to printing out additional copies of the file names, and to opening a few files to examine their contents." *Ibid.*

The Second Circuit concluded that "the DOT investigators were justified in returning to confirm the nature of the non-standard DOT programs loaded on Leventhal's computer by copying directories, printing file names, and opening selected files," because "the first search yielded evidence upon which it was reasonable to suspect that a more thorough search would turn up additional proof that Leventhal had misused his DOT office computer." 554 F.3d at 76-77. Significantly, even in the later stages, the DOT investigators did not "open[] and examine[] any computer files containing individual tax returns." *Id.* at 76.

In *Biby v. Board of Regents of the University of Nebraska at Lincoln*, the Eighth Circuit approved a similarly limited search of an employee's work computer by a public university in preparation for an arbitration. 419 F.3d at

851. The Eighth Circuit held that the university's search of the employee's computer was reasonable because it was limited in the following ways: "the search was conducted within the discovery period for the arbitration," *ibid*; the search was conducted by using "key word[s] . . . related to the [arbitration] dispute," *id.* at 849; and the computer specialist conducting the search "immediately closed any file that appeared not to relate to the dispute," *ibid.*

By contrast with *Leventhal* and *Biby*, the public employer in this case "did not consider whether there was a less intrusive means of conducting the audit." Pet. App. 53. Rather, the City immediately conducted the most intrusive search possible by "review[ing] the contents of all the messages, work-related and personal," Pet. App. 36, and in the process exposed private communications that were both highly sensitive and completely irrelevant to the City's investigation. Applying the standard established in *Ortega*, the City's search was not reasonable in scope, because it was "excessively intrusive in light of . . . the nature of the [noninvestigatory work-related purpose]." 480 U.S. at 726.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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CITY OF ONTARIO, CALIFORNIA, ET AL.,

Petitioners,

v.

JEFF QUON, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF ELECTRONIC FRONTIER FOUNDATION, CENTER FOR DEMOCRACY & TECHNOLOGY, AMERICAN CIVIL LIBERTIES UNION, AND PUBLIC CITIZEN AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICI CURIAE*[1]

This case brings before the Court important issues regarding the application of the Fourth Amendment's protection of personal privacy in the context of new communications technologies. *Amici* consist of the following nationwide organizations that seek to preserve individuals' privacy rights, including the protection afforded by the Fourth Amendment:

The Electronic Frontier Foundation (EFF) is a member-supported, non-profit legal foundation that litigates to protect free speech and privacy rights in the digital world. As part of its mission, EFF has often served as counsel or *amicus* in key cases addressing constitutional and statutory rights of privacy in electronic communications.

The Center for Democracy & Technology (CDT) is a non-profit public interest organization focused on privacy and other civil liberties issues affecting the internet and other communications networks. CDT represents the public's interest in an open, decentralized Internet and promotes the constitutional and democratic values of free expression, privacy, and individual liberty.

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with over 500,000 members dedicated to the principles of

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* or their counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk.

liberty and equality embodied in the Constitution and this nation's civil rights laws. Since its founding in 1920, the ACLU has appeared before this Court in numerous cases involving the interpretation of the Fourth Amendment and, more generally, the application of the Constitution to new technologies. See, *e.g.*, *Reno* v. *ACLU*, 521 U.S. 844 (1997).

Public Citizen is a national consumer-advocacy and watchdog organization based in Washington, D.C. Since its founding in 1971, Public Citizen has argued as counsel and as *amicus curiae* for the privacy rights of consumers. Public Citizen has also represented government employees in cases involving the intersection of the Constitution and the government's authority as an employer, including *Garcetti* v. *Ceballos*, 547 U.S. 410 (2006).

SUMMARY OF ARGUMENT

1. Communication in America is in the midst of a technological revolution. Information that individuals formerly conveyed in oral conversations (either face-to-face or over the telephone) or in letters or other physical correspondence is now routinely transmitted using text messages or emails.

This case presents the Court with one of its first opportunities to address the application of the Fourth Amendment to private information conveyed via these new mediums of communications. Given the technological complexity of the context, and the extremely significant implications for continued protection under the Fourth Amendment of Americans' most private communications, the Court should proceed cautiously and limit its decision to the specific factual circumstances presented here.

To begin with, the technology used to transmit text messages and email creates an expectation of privacy that is just as reasonable as that associated with the more traditional modes of communication that are being replaced. The processes of sending the communications are similar, and the actual chances that a message will be read by someone other than the sender and recipient are infinitesimal in each situation. Moreover, Congress enacted the Stored Communications Act to reinforce the privacy of the content of electronic written communications—a factor that plainly supports the reasonableness of users' privacy expectations.

The factual circumstances of this case—in which an employee used an employer-provided communications device to send electronic written communications—are not at all unique. Many employers, both governmental and private, provide communications devices to their employees. And they permit, and often encourage, employees to use those devices for personal as well as business communications. That is because the more the employee uses the device away from the office, the more accessible the employee is for after-hours work assignments—and the greater the benefit to the employer. The mixed personal and professional use of company-provided devices is an essential tool for transacting business in the information age.

Petitioners argue that the Police Department's policy applicable to employees' internet use vitiates any reasonable expectation of privacy on the part of respondents. That argument is wrong on the merits. But to the extent the Court addresses the argument, it should make clear that its analysis applies only in the context of government workplace searches. A

private employer's policy permitting the employer to access messages transmitted on company-provided devices does not affect in any way the employee's reasonable expectation that the messages will remain inaccessible to the government. And whatever authority the government may have to monitor employee communications in its role as employer is limited to that context, and does not apply to law enforcement searches.

2. The legal framework for deciding this case is provided by the plurality opinion in *O'Connor* v. *Ortega*, 480 U.S. 709 (1987). The threshold question is whether both courts below correctly determined that Officer Quon had a reasonable expectation of privacy in the content of the text messages. Those holdings are correct.

Both lower courts found as a fact that petitioners' written internet use policy did not encompass text messaging. Petitioners' sole support for their contention that the policy did apply to text messaging is Lieutenant Duke's testimony that he informed members of the Police Department that pager messages would fall within the policy. But the very same Lieutenant Duke established the informal policy and practice that text messages would not be reviewed as long as employees paid any overage charges—the policy and practice that support Officer Quon's reasonable expectation of privacy. Because petitioners themselves rely on the authoritative nature of some of Lieutenant Duke's statements, they cannot dispute the authoritative status of the statements and actions of the same individual relied upon by respondents.

The search here did not comply with *O'Connor*'s requirement that a government workplace search

must be reasonably related to the goals of the search and not "excessively intrusive." 480 U.S. at 726. The reason for the search was to determine whether police officers were being required to pay for work-related messages. Several obvious alternative approaches—for example, asking officers to identify work-related text messages in excess of the existing monthly character allotment—would have enabled petitioners to fulfill their purpose without intruding on the sensitive privacy interests protected by the Fourth Amendment.

ARGUMENT

I. THE COURT SHOULD TREAD CAUTIOUSLY IN ADDRESSING THE APPLICATION OF THE FOURTH AMENDMENT TO NEW COMMUNICATION TECHNOLOGIES.

Mobile communications devices—including cellular phones, pagers, and combination devices known as smartphones—have rapidly become ubiquitous. Unlike traditional ("landline") telephones, these new devices are not limited to transmitting oral conversations; they also enable users to exchange written communications through the extremely popular medium of text messages.

Increased access to the internet in homes and offices, as well as through mobile devices such as the Blackberry and iPhone, is also producing an explosion in electronic written communication via email. These new technologies are combining to displace landline telephones, letters, and even face-to-face interaction as dominant means of communication.

Although these new media are now a part of everyday life for most Americans, the courts have had few opportunities to address the extent to which the

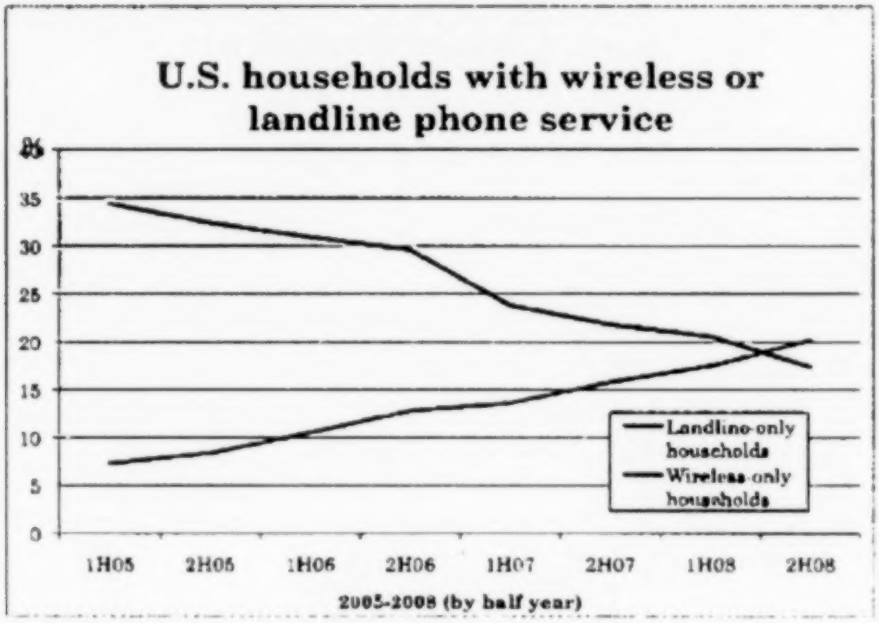
Fourth Amendment limits governments' ability to access citizens' private communications effected via these new technologies. These questions are complex, turning on the application of settled legal principles in new and technologically complex contexts. *Cf. Kyllo* v. *United States*, 533 U.S. 27, 34 (2001) (refusing to "permit police technology to erode the privacy guaranteed by the Fourth Amendment").

This Court accordingly should proceed with caution, and take care to limit its decision here to the specific factual situation before it. The Court's ruling otherwise could have unjustified and unintended, but extremely significant, implications for the continued protection under the Fourth Amendment of Americans' most private communications, which increasingly are conducted using these new technologies. Compare *Katz* v. *United States*, 389 U.S. 347, 355 (1967) (overturning prior holding in *Olmstead* v. *United States*, 277 U.S. 438 (1928), regarding application of Fourth Amendment to telephone conversations); *id.* at 362 (Harlan, J., concurring) (observing that the Court's prior requirement of physical penetration of a premises to establish a Fourth Amendment violation "is, in the present day, bad physics as well as bad law, for reasonable expectations of privacy may be defeated by electronic as well as physical invasion").

A. Text Messaging and Email Are Rapidly Replacing Traditional Forms of Communication.

Cell phones and similar mobile communication devices have become omnipresent. A 2009 survey

found that 85% of adults owned a mobile phone.[2] Approximately nine out of ten adults use a mobile phone and one in seven adults owns *only* a mobile phone.[3] Furthermore, 14.5% of American homes received "all or almost all" calls on wireless telephones, even if there also was a landline telephone in the house. Stephen J. Blumberg & Julian Luke, *Wireless Substitution: Early Release of Estimates From the National Health Interview Survey*, CDC National Center for Health Statistics, July-December 2008, http://tiny.cc/cdcnihstats. The chart below demonstrates the extent to which wireless-only homes are surpassing landline-only households. *Ibid.*



[2] See Amanda Lenhart, *Teens and Mobile Phones Over the Past Five Years: Pew Internet Looks Back* (Aug. 19, 2009), http://www.pewinternet.org/Reports/2009/14--Teens-and-Mobile-Phones-Data-Memo.aspx.

[3] See Harris Interactive, Harris Poll #36, *Cell Phone Usage Continues to Increase* (Apr. 4, 2008), http://www.harrisinteractive.com/vault/Harris-Interactive-Poll-Research-Cell-Phone-Usage-Continues-to-Increase-2008-04.pdf.

Landline telephones are limited to voice communication, but mobile phones offer opportunities for written communication and sharing of photo and video messages. Text messaging, also known as "SMS" (short message service) or "texting," uses cell phones or pagers to send and receive electronic written messages.

Texting, along with the related services for transmitting photos and videos between phones, has become an extremely popular form of communication, with an average of 4.1 billion text messages sent and received in the nation *each day*. See Press Release, CTIA, The Wireless Association Announces Semi-Annual Wireless Industry Survey Results (Oct. 7, 2009), http://www.ctia.org/media/press/body.cfm/prid/1870.

Many Americans today use text messages to convey information that formerly would have been the subject of an oral telephone conversation. According to a 2008 Nielson Mobile survey, U.S. mobile subscribers "sent and received on average 357 text messages per month [in the second quarter of 2008], compared with making and receiving 204 phone calls a month * * *. The new statistic clearly indicates that Americans have jumped onto the SMS text bandwagon." Marguerite Reardon, *Americans Text More Than They Talk*, CNET, Sept. 22, 2008, http://tiny.cc/CNET.

Indeed, political and humanitarian campaigns now utilize text-messaging as a preferred method for reaching supporters. After the devastating earthquake in Haiti in January 2010, the American Red Cross raised $7 million in two days from individuals donating $10 each through text-messaged donations over wireless networks. The "magic," as media ana-

lyst Jeff Roster termed it, was the ease of being able to support a distant place in need through a simple and quick text message. "People are comfortable with text messaging," he says. "Texting is the form of communication for the next generation."[4]

Text-message use is expected to continue to surge. One study estimated that there were 5 trillion SMS texts sent worldwide in 2009 and that there will be more than 10 trillion SMS texts sent worldwide in 2013. *SMS & MMS Outlook Strong; Text Message Revenues Reaching $223B by 2014*, Qwasi (Feb. 3, 2010), http://www.qwasi.com/news/blog/sms-text-message-revenues-reaching-233b-by-2014.htm.[5]

The data regarding use of email is similarly dramatic. An estimated 74% of adults use the internet. Pew Research Center, *Internet, Broadband, and Cell Phone Statistics*, http://www.pewinternet.org/Reports/2010/Internet-broadband-and-cell-phone-statistics.aspx. The number of non-spam emails sent

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[4] Tom Kaneshige, *Haiti Donations: A Turning Point in Mobile Commerce?*, CIO (Feb. 10, 2010), http://www.cio.com/article/538513/Haiti_Donations_A_Turning_Point_in_Mobile_Commerce_.

[5] Text messaging is a particularly prevalent form of communication among young people. One study found that American teenagers sent, on average, "10 texts per hour that they're awake and not in school. That's an average of 3,146 per month." Helen Leggatt, *U.S. Teens Texting Ten Times Per Hour*, Bizreport, Feb. 9 2010, http://www.bizreport.com/2010/02/us_teens_texting_ten_times_per_hour.html. While the number of calls sent and received by mobile-phone using teenagers is remaining constant (and relatively low) the number of text messages is sky-rocketing. See *Teens Point the Way to Texting Trends (averaging 2900 txt per month)*, Qwasi, Oct. 1, 2009, http://www.qwasi.com/news/blog/teens-point-the-way-to-texting-trends-averaging-2900-txt-per-month.htm.

worldwide per day reached an estimated 47 billion in 2009. Press Release, The Radicati Group, Inc., Email Statistics Report, 2009-2013, at 1 (May 6, 2009), *available at* http://tinyurl.com/emailstatistics.

Text messaging and email are not substituting only for oral telephone conversations. The increase in the use of these new technologies has been accompanied by a corresponding decline in the use of traditional mail. The number of pieces of first-class mail handled by the Postal Service has declined on an accelerating basis over the past four years—the reduction was 1.8% from 2006 to 2007; 4.8% from 2007 to 2008; and 8.6% from 2008 to 2009. United States Postal Service, Operating Statistics, http://www.usps.com/cpim/ftp/ar09html/ar_2_115.htm. For the first quarter of 2010, the decline in total mail volume amounted to an additional 9.0% compared to the first quarter of 2009. Press Release, United States Postal Service, Postal Service Begins 2010 with First-Quarter Loss (Feb. 9, 2010), http://www.usps.com/communications/newsroom/2010/pr10_014.htm.

The data thus establish a clear shift in Americans' private communications from traditional media—physical mail and oral telephone conversations—to text messages and email messages.

B. The Technology Used To Transmit Text Messages And Email Creates An Expectation Of Privacy As Reasonable As That Associated With Older Forms of Communication.

Text messaging and email utilize new forms of technology to transmit written communications from one individual to another, but the characteristics of

those technologies give rise to expectations of privacy in the senders and recipients of such messages that are virtually identical to, and just as reasonable as, the privacy expectations associated with messages transmitted via more traditional communications media.

First, the sending of electronic written communications from one device to another—whether text messages via phones or email messages via computers or smartphones—resembles the process for sending physical letters. The sender composes a message and transmits it to the recipient, retaining a copy for himself. The recipient receives an electronic copy of the message, which he may retain or (at least for email) transform into a physical document by printing out the message.

Senders and recipients of physical written communications have reasonable expectations of privacy in information contained in those documents. *United States* v. *Jacobsen*, 466 U.S. 109, 114 (1984) ("[l]etters and other sealed packages are in the general class of effects in which the public at large has a legitimate expectation of privacy"). That is true notwithstanding the fact that letters and packages may be opened by persons other than the recipient—either intentionally or unintentionally—including for legitimate reasons (*e.g.*, because they are misdelivered or damaged in transit or because the address becomes illegible) or for illegitimate reasons (*e.g.*, malfeasance by postal employees or by neighbors or others interfering with the proper delivery of those messages).[6]

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[6] The same is true of oral telephone conversations, which may be accessed by employees of communications carriers as well as

The senders and recipients of electronic written communications have a similar expectation of privacy. Although it is technically possible for the electronic written communication to be viewed by a person other than the recipient—such as an employee of one of the entities providing transmission or delivery services—the actual chances are infinitesimal that such an interception will occur with respect to any of the billions of emails or text messages sent each day.

In the electronic context, the process of transmission may create copies of the message on the servers operated by one or more providers of services enabling the transmission and delivery of the electronic written communication. And those copies are accessible by the entities supplying the transmission services. But Congress has specifically reinforced users' reasonable expectations of privacy by strictly regulating—through the use of criminal sanctions—access to and distribution of the contents of electronic written communications.

The Stored Communications Act, 18 U.S.C. §§ 2701 *et seq.*, bars anyone providing an "electronic communication service"—which is defined as "any service which provides to users thereof the ability to send or receive wire or electronic communications," *id.* § 2510(15)—from divulging the contents of communications in electronic storage to anyone other than the "addressee or intended recipient of such communication," *id.* § 2702(a)(1) & (b)(1), with very limited specified exceptions. Significantly, government entities may compel disclosure of the content of

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by other persons—from family members or co-workers listening on other extensions, to those using more surreptitious means.

a communication only through a warrant, court order, or subpoena. *Id.* § 2703(a) & (b).

Congress enacted this statute to "update and clarify Federal privacy protections and standards in light of dramatic changes in new computer and telecommunications technologies." S. Rep. No. 99-541, at 1 (1986), reprinted in 1986 U.S.C.C.A.N. 3555, 3555. It pointed out that

> [w]hen the Framers of the Constitution acted to guard against the arbitrary use of Government power to maintain surveillance over citizens, there were limited methods of intrusion into the 'houses, papers, and effects' protected by the fourth amendment. During the intervening 200 years, development of new methods of communication and devices for surveillance has expanded dramatically the opportunity for such intrusions.

Id. at 1-2. Existing law, Congress found, was "'hopelessly out of date.' It has not kept pace with the development of communications and computer technology. Nor has it kept pace with changes in the structure of the telecommunications industry." *Id.* at 2 (citation omitted). The Stored Communications Act fills this gap by ensuring protection of Americans' privacy in the context of these new communications technologies.

Indeed, the court below relied on this statute in holding that the company providing text messaging services to the Department violated the Act by turning over the text message transcripts to the City. Pet. App. 20-21. That holding—which this Court declined to review—makes clear the strong support for

Officer Quon's reasonable expectation of privacy that results from the congressional enactment.

For all of these reasons, senders and recipients of electronic written communications have a reasonable expectation of privacy—grounded in the nature of the technology and in statutes enacted by Congress—with respect to the contents of those messages.

Second, the sending of a written communication—whether physical or electronic—does not eliminate the sender's reasonable expectation of privacy in any copy of the communication that he retains. To be sure, once a communication is sent, the sender no longer exercises exclusive control over the message's contents: The recipient may choose voluntarily to disclose the copy of the letter that he received. Or the government may compel the recipient to disclose the delivered copy of the communication through means that comply with the Fourth Amendment's reasonableness requirement (which would apply because a recipient of a written electronic communication who did not disclose the message's contents would have a reasonable expectation of privacy in those contents).

But the government cannot without a showing of probable cause—or satisfying any other applicable Fourth Amendment reasonableness standard—compel an individual (or a business) to disclose retained copies of sent correspondence. If sending a communication completely vitiated the sender's reasonable expectation of privacy, then the Fourth Amendment would not preclude the government from demanding such documents routinely from anyone without *any* particularized suspicion whatever.

And it cannot be argued that a different rule should apply with respect to the sender or recipient's retained copies of electronic communications because the transmission and delivery process creates additional copies of the message—Congress in the Stored Communications Act has tightly regulated disclosure by persons possessing such copies in a manner that enhances the reasonableness of the sender's and recipient's expectations of privacy in any copies of the email or text messages that they retain. Just as the sender of a physical letter has a reasonable expectation of privacy in his retained copy of that letter, senders of electronic communications have an expectation of privacy in retained email and text messages.

Third, to the extent an electronic written communication is not disclosed voluntarily by either the sender or recipient, the Stored Communications Act confers on both parties to the communication a reasonable expectation of privacy with respect to copies of the message retained by entities providing services related to the sending, transmission, or receipt of the message. After all, that statute's very purpose is to prevent (with extremely limited exceptions) the disclosure of the contents of electronic communications in the absence of the consent of the parties to the communication. Its effect is to give those individuals a reasonable expectation that their communication will remain private unless one of them decides to reveal it.[7]

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[7] One lower court recently espoused the expansive, and in our view erroneous, principle that the sender of an electronic written communication can have no reasonable expectation of privacy with respect to the copy of the communication that is in

C. Employers Typically Permit—And Often Encourage—Employees To Use Employer-Provided Equipment To Transmit Personal Emails And Text Messages.

Text messaging and email are not only staple tools of personal communication, but of business communication as well.

Nearly a quarter of the private workforce uses employer-provided mobile devices. See Osterman Research, Inc., *Mobile Messaging Market Trends, 2008-2011,* Oct. 2008, *available at* http://tinyurl.com/markettrends2008-2011. That figure continues to grow. By the middle of 2010, almost 40% of corporate employees are expected to use mobile devices provided by their employers. See *ibid.* And the use of such devices is no longer confined to major companies. As the price of mobile devices plummeted, the use of such devices in smaller entities has skyrocketed. Mobile devices now play a vitally important role in American small businesses. Indeed, "seventy-eight percent of small business owners use a cell-phone for business purposes." Nat'l

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the hands of the service provider. *Rehberg* v. *Paulk*, No. 09-11897, 2010 WL 816832 (11th Cir. Mar. 11, 2010). This mistaken conclusion is based on a misreading of two much more limited decisions—*United States* v. *Lifshitz*, 369 F.3d 173, 190 (2d Cir. 2004) ("special needs" of the probation system may render a computer monitoring condition reasonable), and *Guest* v. *Leis*, 255 F.3d 325, 333 (6th Cir. 2001) (no expectation of privacy in messages sent to a public bulletin board system visited by FBI agent). As discussed in the text, it is true that the sender cannot prevent the recipient from voluntarily disclosing the contents; but in the absence of such a voluntary disclosure, the sender retains an expectation of privacy in the copies of the communications retained by the sender and by a service provider.

Fed. of Indep. Bus., *411 Small Business Facts: Telecommunications*, http://www.411sbfacts.com/sbpoll-about.php?POLLID=0022.

The proliferation of mobile devices has produced a significant benefit for businesses, "mak[ing] sure that employees are only a click or a call away from work at all times." John Schulze, Jr., *Technology Has Created the Perpetual Workplace*, 34, For the Defense, Oct. 2009, http://www.dri.org/(S(r4hiuj45mjaudwyvspjtsx3q))/articles/CommercialLitigation/FTD-0910-Schulze.pdf. Employees with employer-provided devices "are expected to remain tethered to the office 24-7." Editorial, *The IRS Phones Home*, Wall St. J., June 16, 2009.[8]

A corporate executive can now be just as engaged in work-related activity while standing in line at the grocery store or attending a baseball game as she is when sitting at her office desk. Surveys showcase this new reality. For instance, some "37% of mobile users check their mobile email [on their handheld device] more than 10 times each day. Even on the weekend, 47% of mobile users check their mobile email more than 10 times per day." See Osterman Research, *supra*, at 2. And 76% of employees with a mobile device "always" bring it with them on vacations. *Ibid.*; see also Jay Akasie, *'Addiction' to BlackBerries May Bring on Lawsuits*, The Sun (N.Y.),

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[8] See also Jennifer Stisa Granick & Kurt Opsahl, Op-ed, *Taking Reality Into Account*, N.Y. Times, Dec. 21, 2009, http://roomfordebate.blogs.nytimes.com/2009/12/21/your-boss-and-your-blackberry/; *Workplace 2.0: The Modern Electronic Workplace and Issues Faced by Employers*, HR Roundtable (The TemPositions Group of Companies), May 7, 2009, at 3, http://www.tempositions.com/site/hrnews/HR_Roundtable_May_2009.pdf.

(N.Y.), Sept. 7, 2006. Smartphone users accordingly "tend to put in more hours than [the] average employee" without such a device. See Gemma Simpson, *Study: BlackBerry Users More Productive*, Silicon.com, July 5, 2007, http://tinyurl/blackberrystudy.

Given that employees carry their employer-provided devices with them at all times, it is only natural that they use them to facilitate both personal and business communications. "[W]orkers increasingly use company-issued mobile devices for texting, e-mailing and browsing the Internet—sometimes for work, sometimes for personal use." Associated Press, *Obama Wants Company Cell Phone Tax Repealed*, MSNBC News, Jan. 31, 2010, http://www.msnbc.msn.com/id/35169772/ns/business-personal_finance/. Employees rely on their employer-provided devices to manage their personal lives as well as their professional ones. See, *e.g.*, Granick & Opsahl, *supra* note 8; William Webb, *Wireless Communications: The Future* 15:13 (2007). Even employers whose policies nominally prohibit the personal use of company devices "frequently turn a blind eye to employees engaging in personal activities 'on the clock'" because of the substantial economic benefits they gain from personal use of these employer-provided facilities. See Timothy B. Lee, *Snooping Isn't the Answer*, N.Y. Times, Dec. 21, 2009, http://roomfordebate.blogs.nytimes.com/2009/12/21/your-boss-and-your-blackberry/.

The practice of managing personal activities on one's "work" phone has thus become routine for millions of employees. It represents "one side of a *quid pro quo*: the same employee who spends an afternoon ordering Christmas presents on Amazon.com may be expected to take time away from his family to deal

with a weekend emergency at work." *Ibid.* Encouraging or allowing the personal use of company-provided communications devices produces significant business advantages, incentivizing employees to employ their devices ever more *frequently*, and thus to be ever more available—and willing—to attend to business tasks, in addition to personal ones.

A recent controversy involving the taxation of personal use of employer-provided devices demonstrates the degree to which employers accept, and even encourage, the personal use of company-provided mobile devices. Under a provision of the Internal Revenue Code enacted in 1989, the value of personal use of employer-provided cell phones must be included in an employee's taxable income unless the employer or employee maintains detailed records distinguishing between personal and business calls. Internal Revenue Service, *Notice 2009-46, Substantiating Business Use of Employer-Provided Cell Phones* (June 8, 2009), *available at* http://www.irs.gov/irb/2009-23_IRB/ar07.html. The IRS issued a notice in 2009 requesting comments on several proposed reforms to the law's reporting requirements. *Ibid.*

This request for comment generated uniform opposition to the reporting requirement. See, *e.g.*, 1-4 Bender's Payroll Tax Guide § 4.340 (2010); Associate Press, *Obama Wants*, *supra*. The clear message: "[C]ell phones are so ubiquitous and have become such an essential business tool that it's nearly impossible to keep track of the line between professional and personal use." Kim Hart, *IRS Asked to Repeal Cell Phone Tax*, The Hill, Sept. 6, 2009.

Only days after requesting public comment on the regulatory proposal, IRS Commissioner Doug

Shulman and Treasury Secretary Timothy Geithner called on Congress to repeal the law outright. See Internal Revenue Service, Statement of IRS Commissioner Doug Shulman, June 16, 2009, http://tinyurl.com/IRSstatement. According to Commissioner Schulman, "The passage of time, advances in technology, and the nature of communication in the modern workplace have rendered this law obsolete." *Ibid.* He urged Congress to "make clear that there will be no tax consequences to employers or employees for personal use of work-related devices such as cell phones provided by employers." *Ibid.*

The reaction to the IRS's proposal makes clear that the personal use of employer-provided devices represents the prevailing business norm. See Osterman Research, *supra*; Lee, *supra*.

D. The Court Should Not Address In This Case The Impact of Employers' Monitoring Policies On Fourth Amendment Protection Against Law Enforcement Access to Private Sector Or Government Employees' Electronic Communications.

This case involves the extent to which *government* employees have a reasonable expectation of privacy protected by the Fourth Amendment with respect to their use of an electronic communication system provided by their employer. One of the principal arguments advanced by petitioners is that the Police Department's internet use policy undermines all reasonable expectation of privacy in this case. See, *e.g.*, Pet. Br. 31. *Amici* do not share that view for the reasons stated below.

To the extent the Court chooses to discuss the effect of such a government policy on the reasonable-

ness of Officer Quon's expectation of privacy, it should make clear that its analysis in this case relates solely to the government workplace context and not to the very different questions (1) whether a private employer's internal policy regarding monitoring of electronic communications affects its employees' reasonable expectation, protected by the Fourth Amendment, with respect to the privacy of those electronic communications vis-à-vis government law enforcement officers; and (2) whether a government workplace monitoring policy may affect a government employee's reasonable expectation of privacy with respect to government law enforcement access to emails and text messages.

The fact that a private employee may agree as a condition of his use of the employer's electronic communication system to permit the employer access to the content of his communications no more undermines the legitimacy of the employee's expectation of privacy vis-à-vis the government than the private employer's right to search the employee's office vitiates the employee's protection under the Fourth Amendment against an unreasonable government search of that office. See, *e.g.*, *Mancusi* v. *DeForte*, 392 U.S. 364, 369 (1968) (employer's access to office does not undermine employee's reasonable expectation of privacy vis-à-vis the government).

That distinction is simply a specific recognition of the general Fourth Amendment principle that permitting other private parties to access protected spaces or materials does not diminish privacy expectations as against the government or other entities to whom the private parties have not granted consent. Admitting a guest to one's home or allowing an accountant to visit an office and review private papers

does not mean government actors may enter the home or seize the papers from the individual without a warrant. So too here. Permitting a private employer to access messages transmitted on company-provided devices does not vitiate the employee's reasonable expectation that the messages will remain inaccessible to the government.[9]

When an individual's employer *is* the government, the inquiry is a bit more complex. To the extent a government employer has established a legitimate policy providing for access to otherwise private places or communications,[10] a government employee cannot make the argument—available to private sector employees—that the policy has no relevance to the individual's expectation of privacy vis-à-vis the government as employer. But whatever authority the government may have to monitor employee communications in its role as employer is limited to that context, and does not apply to law enforcement searches. *O'Connor*, 480 U.S. at 717 (plurality opinion) ("The operational realities of the workplace, however, may make some employees' expectations of privacy unreasonable when an intrusion is by a supervisor rather than a law enforcement official.").[11] Conclusions regarding the effect on the

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[9] The Solicitor General explicitly limits her argument regarding the impact of an employer's policy to the government employee context. *E.g.*, U.S. Br. 12 (referring to "government employer['s]" reservation of a right of access) & 16 (citing decisions regarding government policies).

[10] As we discuss below, the government's authority to establish such policies is constrained by the unconstitutional conditions doctrine. See note 13, *infra*.

[11] Compare *Michigan Dep't of State Police* v. *Sitz*, 496 U.S. 444 (1990) (allowing highway stops for safety purposes without in-

legitimacy of an expectation of privacy of a policy adopted by a government employer are not at all transferable to law enforcement access in either the public or the private employment situation.

Prudential reasons also counsel against allowing employment policies to trump employees' expectations of privacy in electronic written communications.

Many private employers have policies permitting them to access employees' emails and other communications for specified purposes. American Management Association, *The Latest on Workplace Monitoring and Surveillance*, Mar. 13, 2008, http://tinyurl.com/yjb4q4a (43% of employees surveyed review computer files whereas 70% filter messages). Employers desire such access in order to prevent use of their communications system for illegal purposes, to obtain information relevant to employee performance, and for other legitimate business reasons. If the unavoidable consequence of agreeing to employer access on these grounds were unfettered government access to all of an employee's emails—without any judicial oversight—many employees might be reluctant to use their employer's systems for personal messages.

Permitting such automatic government access would undermine the incentive structure at the heart of private-sector privacy policies. As we have discussed, many employers benefit significantly from their employees' personal use of employer-provided communications systems. But surrendering a slight

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dividualized suspicion), with *City of Indianapolis* v. *Edmond*, 531 U.S. 32 (2000) (prohibiting highway stops for law enforcement purposes without individualized suspicion).

amount of privacy to an employer is one thing; surrendering a broad swath of privacy to the government is quite another. Employees might hesitate, under this system, to use the employer's communications devices at all. Or they might use them more sparingly, thus eliminating the business advantage derived from employees' constant use of mobile devices. See pages 17-18, *supra*.

In addition, holding that an employer's monitoring policy suffices to eliminate any reasonable expectation of privacy would dramatically restrict the Fourth Amendment protection accorded individuals' most private communications. Nothing in this Court's jurisprudence supports that result.

For these reasons, the Court should limit its ruling in this case to the government employer context and make clear that it is not addressing the effect of employers' electronic communications system use policies upon the Fourth Amendment protection against warrantless law enforcement surveillance of employees' written electronic communications.

II. THE SEARCH HERE VIOLATED THE FOURTH AMENDMENT STANDARD APPLICABLE TO SEARCHES OF GOVERNMENT WORKPLACES.

All agree that the issue presented here is governed by the standard set forth in the plurality opinion in *O'Connor* v. *Ortega*, 480 U.S. 709 (1987). The parties' disagreement before this Court involves two case-specific, and entirely record-dependent, issues: first, whether on the particular facts here Officer Quon had a reasonable expectation of privacy in the content of the text messages; and second, whether the Department's search was reasonably related to

its goals and not excessively intrusive. There is no basis for reversing the court of appeals' determinations regarding these issues, which are fully supported by the record in this case.

A. The *O'Connor* Plurality Opinion Supplies The Governing Standard.

This Court in *O'Connor* addressed public employees' Fourth Amendment rights against unreasonable searches by their employer. The *O'Connor* plurality recognized that the Fourth Amendment provides protection against unreasonable searches conducted by government officials in other noncriminal contexts and extended that rationale to the public workplace. See *New Jersey* v. *T.L.O.*, 469 U.S. 325 (1985) (school officials); *Camara* v. *Municipal Court*, 387 U.S. 523 (1967) (building inspectors); *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307 (1978) (OSHA inspectors). See also *O'Connor*, 480 U.S. at 714-15 (citing these cases).[12]

The *O'Connor* inquiry is context-specific, examining the "operational realities of the workplace" to determine whether a public employee has a reasonable expectation of privacy vis-à-vis her employer. *Id.* at 717. There is "no talisman that determines in all cases those privacy expectations that society is prepared to accept as reasonable." *Id.* at 715; see also *id.* at 718 ("the question whether an employee has a

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[12] *O'Connor* applies only to "noninvestigatory work-related intrusion[s] or an investigatory search for evidence of suspected work-related employee misfeasance." *O'Connor*, 480 U.S. at 723. Because the jury in this case found that "Chief Scharf's intent was to 'determine the efficacy of the character limit,'" Pet. App. 34, the text message audit falls under *O'Connor*'s noninvestigatory, work-related intrusion prong.

reasonable expectation of privacy must be addressed on a case-by-case basis"); *id.* at 717 ("[t]he employee's expectation of privacy must be assessed in the context of the employment relation"). *O'Connor* therefore mandates a case-by-case approach that takes into account the diversity of workplace environments and of policies promulgated by government employers.

If the public employee has a reasonable expectation of privacy in the workplace, *O'Connor* adopts a familiar two-pronged inquiry to ascertain whether a workplace search was reasonable. First, the search must be justified at its inception. See *id.* at 726. A workplace search is justified at its inception if "necessary for a noninvestigatory work-related purpose such as to retrieve a needed file" or necessary for an investigation of workplace-related misconduct. *Ibid.*

Second, the search must be "reasonably related in scope to the circumstances which justified the interference in the first place" and "not excessively intrusive." *Ibid.* (quoting *T.L.O.*, 469 U.S. at 341, 342). Once again, *O'Connor* requires a fact-bound inquiry into the government employer's actions.

The *O'Connor* plurality standard has been applied consistently by the lower courts. See *United States* v. *Mancini*, 8 F.3d 104, 108 (1st Cir. 1993); *Leventhal* v. *Knapek*, 266 F.3d 64, 74 (2d Cir. 2001) (Sotomayor, J.); *United States* v. *Simons*, 206 F.3d 392, 398 (4th Cir. 2000); *United States* v. *Johnson*, 16 F.3d 69, 73-74 (5th Cir. 1994); *Am. Postal Workers Union* v. *U.S. Postal Serv.*, 871 F.2d 556, 560 (6th Cir. 1989); *Narducci* v. *Moore*, 572 F.3d 313 (7th Cir. 2009); *Biby* v. *Bd. of Regents*, 419 F.3d 845, 850-851 (8th Cir. 2005); *United States* v. *Taketa*, 923 F.2d 665, 673-674 (9th Cir. 1991); *United States* v. *Ange-*

Angevine, 281 F.3d 1130, 1134 (10th Cir. 2002); *United States* v. *Esser*, 284 Fed. Appx. 757, 758-759 (11th Cir. 2008); *Stewart* v. *Evans*, 351 F.3d 1239, 1243 (D.C. Cir. 2003) (Roberts, J.). The standard strikes a manageable and appropriate Fourth Amendment balance between the government's interest in running an efficient workplace and public employees' rights to privacy.

Indeed, petitioners and the Solicitor General agree that the *O'Connor* plurality opinion supplies the appropriate test. Pet. Br. 22-28; U.S. Br. 12-13 & 27-28.

B. The Government Employee Respondents Had A Reasonable Expectation Of Privacy In Their Text Messages.

Under *O'Connor*, all of the "operational realities of the workplace," 480 U.S. at 717, must be considered in determining whether there is a reasonable expectation of privacy. Both courts below correctly held that the officers had a reasonable expectation of privacy in the content of the text messages sent and received via the government-provided pagers.

Petitioners do not argue that the sender and recipient of a text message may never have a reasonable expectation of privacy in the message's contents. See Pet. Br. 63 ("But whether users of text mesaging generally have a reasonable expectation of privacy in the content of text messages is not the issue here."); U.S. Br. 31 n.14 ("[N]o party has argued in this case that respondents lost all expectation of privacy the moment their messages were passed to [the wireless provider] for delivery * * *."). Rather, the arguments advanced by petitioners and their *amici* turn on the particular facts of this case. When those facts are ex-

amined, however, they plainly support the lower courts' determination.

1. *Lieutenant Duke's Interpretation Of The Department's Policy, Together With His Settled Practice, Supported A Reasonable Expectation Of Privacy.*

Both courts below concluded (a) that the City did not have a written policy that expressly governed the use of the pagers, Pet. App. 6, 29-31, 47-48, 49-51, 88-89, 90-91; see also *id.* at 127; and (b) that the Department had "informal—but express and specific—policy and practices that did govern use of the pagers" *id.* at 127 (Wardlaw, J.) (concurring in the denial of rehearing en banc); see also *id.* at 30, 98. "[T]his Court has frequently noted its reluctance to disturb findings of fact concurred in by two lower courts." *Rogers* v. *Lodge*, 458 U.S. 613, 623 (1982); see also *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 317 n.5 (1985). And the two factual findings concurred in by the lower courts here compel the conclusion that Officer Quon had a reasonable expectation in the privacy of his email messages.

First, the position of petitioners and their *amici* is premised almost exclusively on the contention that the Department's written "no privacy" policy encompassed text messages. *E.g.*, Pet. Br. 31-35. But that written policy did not expressly include pagers or text messaging; indeed, the policy had been issued to, and acknowledged by, Officer Quon before the Department even acquired the pagers. Pet. App. 5. That is why both lower courts found as a factual matter that the written policy was inapplicable.

Second, petitioners' sole support for their contention that the policy encompassed text messages is Lieutenant Duke's testimony that he informed members of the Police Department that pager messages would fall within the policy. Pet. Br. 33-34. But this is the very same Lieutenant Duke who established the informal policy and practice that text messages would not be reviewed as long as employees paid any overage charges.

Lieutenant Duke explained that the "practice was, if there was overage, that the employee would pay for the overage that the City had." Pet. App. 6 (internal quotation marks omitted). He testified that Officer Quon "needed to pay for his personal messages so we didn't—pay for the overage so we didn't do the audit." Pet. App. 51; see also *id.* at 8 (Officer Quon testified that he was told by Lieutenant Duke that "if you don't want us to read [your messages] pay the overage fee").

Moreover, the Department's actual practice was consistent with this informal policy established by Lieutenant Duke. Each time Office Quon exceeded the monthly allotment, Lieutenant Duke would tell him how much he owed and Officer Quon would pay that amount; the Department did not review Officer Quon's messages. Pet. App. 7-8. This practice was maintained for several months until Lieutenant Duke precipitated the review of text messages that gave rise to this action. *Ibid.* The district court found:

> Lieutenant Duke made it clear to the staff, and to Quon in particular, that he would *not* audit their pagers so long as they agreed to pay for any overages. Given that Lieutenant Duke was the one in charge of administering the use of the city-owned pagers, his state-

> ments carry a great deal of weight. Indeed, before the events that transpired in this case the department did not audit any employee's use of the pager for the eight months the pagers had been in use. * * * Lieutenant Duke in effect turned a blind eye to whatever purpose an employee used the pager, thereby vitiating the department's policy of any force or substance.

Id. at 90.

In light of these facts, both courts below concluded that "it was reasonable for Quon to rely on the policy—formal or informal—that Lieutenant Duke established and enforced." Pet. App. 31; see also *id.* at 90-91 ("Lieutenant Duke effectively provided employees a reasonable basis to expect privacy in the contents of the text messages they received or sent over their pagers; the only qualifier to guaranteeing that the messages remain private was that they pay for any overages"). Lieutenant Duke's informal, permissive policy contrasts sharply with an environment in which "searches were frequent, widespread, or extensive enough to constitute an atmosphere so open to fellow employees or the public that no expectation of privacy is reasonable." *Leventhal*, 266 F.3d at 74 (internal quotation marks omitted) (Sotomayor, J.).

Third, petitioners and the Solicitor General argue that Lieutenant Duke did not occupy a policy-making position in the Department and therefore could not alter the written policy. But the written policy did not by its terms apply to text messaging—the only basis for extending it to include text messaging is the statement to that effect by Lieutenant Duke. And if (as petitioners and the Solicitor General

assume) Lieutenant Duke had sufficient authority to make that statement, he necessarily had sufficient authority to enunciate and implement the policy and practice against reviewing the content of text messages.

For that reason, the nature of Lieutenant Duke's authority is beside the point on the facts here. Because petitioners themselves rely on the authoritative nature of some of Lieutenant Duke's statements, petitioners cannot dispute the authoritative status of the statements and actions of the same individual relied upon by respondents.

Fourth, petitioners point to *O'Connor* in asserting that a Department "no privacy" policy would vitiate any reasonable expectation of privacy in text messages sent over government-provided pagers. Pet. Br. 31-35. But petitioners overstate *O'Connor*, which merely observed that there was no applicable government access policy—and therefore could not, and did not, hold that an access policy is dispositive in every case. *O'Connor*, 480 U.S. at 719 (noting that there was no evidence of any established "reasonable regulation or policy discouraging employees * * * from storing personal papers and effects in their desks"). Moreover, the *O'Connor* inquiry is context-specific and looks to "*actual* office practices and procedures" and "*legitimate* regulation." *Id.* at 717 (emphasis added). Thus, even if the Department's written policy addressed the issue of pager usage, it would not be dispositive.[13]

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[13] For example, a government agency engaged in routine administrative functions surely could not require as a condition of employment that employees waive all Fourth Amendment rights with respect to searches of the employee's person and of-

Fifth, petitioners, but not the Solicitor General, argue that a special standard should apply to text messages of police SWAT teams because there may be a need to review such messages in connection with after-action analyses of SWAT team activity. See Pet. Br. 29-31.

There is no basis in *O'Connor* for such an approach. The fact that the government may at some point have a legitimate basis to review employee text messages, or emails, or physical documents, does not mean that the employee lacks any reasonable expectation of privacy. Indeed, under this theory no government employee would ever have any Fourth Amendment protection with respect to the workplace because some set of facts could be hypothesized that could justify review of his emails or documents. This Court should reject petitioners' attempt to reduce the *O'Connor* standard to a dead letter.

2. *The California Public Records Act Does Not Undermine The Employees' Reasonable Expectation Of Privacy.*

Petitioners also point to the California Public Records Act (CPRA), Cal. Gov't Code § 6250, in asserting that respondents had no reasonable expectation of privacy. Pet. Br. 35-40.

The fact that an electronic record may be reviewed in response to a CPRA request does not un-

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fice. That is because the government may not impose "unconstitutional conditions" in an attempt to circumvent the Fourth Amendment. See *Chandler* v. *Miller*, 520 U.S. 305 (1997) (holding that candidates for public office cannot be required to submit to a suspicion-less drug test); *cf. Rumsfeld* v. *Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 59-60 (2006) (discussing unconstitutional conditions doctrine).

dermine an employee's reasonable expectation of privacy in that record any more than such a review would vitiate the employee's expectation of privacy with respect to personal paper files kept in a government employee's office.[14] An individual's reasonable expectation of privacy is not binary: The fact that someone might review records pursuant to the CPRA does not open the door to review by the government for any purpose whatever. Under petitioner's theory, any document potentially subject to mere review—not even disclosure—whether under the CPRA, the Freedom of Information Act (FOIA), 5 U.S.C. § 552, or the Presidential Records Act (PRA), 44 U.S.C. § 2201, would be stripped of *any* protection under the Fourth Amendment. That expansive contention would deprive the private papers of numerous public employees of all protection simply because they are located in those employees' government offices.

Finally, it is unlikely that the CPRA would require disclosure of the text messages—even if the messages were subject to the CPRA in the first place. The California courts have construed the CPRA to exempt from disclosure as a general matter purely personal information. *California State University* v. *Superior Court*, 108 Cal. Rptr. 2d 870, 879-880 (2001) ("The mere custody of a writing by a public agency does not make it a public record * * *. [P]urely personal information unrelated to 'the con-

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[14] That is especially true when, as here, the lower courts found that there is "no evidence * * * suggesting CPRA requests to the department are so widespread or frequent as to constitute 'an open atmosphere so open to fellow employees or the public that no expectation of privacy is reasonable.'" Pet. App. 94 (quoting *Leventhal*, 266 F.3d at 74).

duct of the public's business' could be considered exempt from this definition, i.e., the shopping list phoned from home, the letter to a public officer from a friend which is totally void of reference to governmental activities.") (citations omitted); see also Cal. Gov't Code § 6254(c) (exempting from CPRA documents whose disclosure "would constitute an unwarranted invasion of personal privacy"). Other states have reached similar conclusions in the context of electronic communications. See, *e.g.*, *Griffis* v. *Pinal County*, 156 P.3d 418 (Ariz. 2007); *Denver Pub. Co.* v. *Board of County Comm'rs*, 121 P.3d 190 (Colo. 2005).

Amici media and publishing organizations correctly point out that even private communications may be subject to disclosure under certain circumstances where those communications relate to the public interest—for example, where communications reflect a dereliction of official duties or a bias that renders the person unfit for his or her position. Am. Br. 24-25. But disclosure under such circumstances, where personal privacy is implicated, is the result of a case-by-case balancing of "the public's interest in disclosure and the individual's interest in personal privacy." *International Federation of Professional and Technical Engineers, Local 21, AFL-CIO* v. *Superior Court*, 165 P.3d 488, 493 (Cal. 2007). This balancing might well justify disclosure of only some portions of a document—for example, the time at which a personal text was sent and the recipient, but not the contents. *Cf. Tiberino* v. *Spokane County*, 13 P.3d 1104 (Wash. Ct. App. 2000) (personal e-mails fell within public records act when used by county to justify termination of employee, but contents of e-mails exempt from disclosure on grounds of privacy). The fact that disclosure of purely personal documents is not the norm under the CPRA is yet another reason

why the statute does not undermine Officer Quon's reasonable expectation of privacy in his personal text messages.

C. The Search Of The Text Messages Was Unreasonable In Its Scope.

The court of appeals correctly determined that—on this record—the search was not reasonably related to its objectives and was excessively intrusive. Pet. App. 34-36.

It is common ground that the "least restrictive means" test is inapplicable to the *O'Connor* inquiry. And, contrary to petitioner's suggestions, Pet. Br. 45-50, the court below did not engage in "least restrictive means" analysis. Pet. App. 33-36; see also *id.* at 133 (Wardlaw, J., concurring in denial of rehearing en banc). Rather, the court below faithfully applied the *O'Connor* standard.

The jury concluded that the sole purpose for the search was to "determine the efficacy of the existing character limits to ensure that officers were not being required to pay for work-related expenses." Pet. App. 119. Although this purpose was permissible, the means chosen were excessively intrusive.

To begin with, the option chosen by petitioners was unlawful. The court of appeals held that disclosure of the text messages to petitioners violated federal law. The decision to utilize that search option was therefore necessarily unreasonable and excessively intrusive.

Even under petitioners' view of the privacy policy, which permits "light personal communications," Pet. Br. 4, moreover, the content audit could reveal embarrassing or inherently private information, such

as a visit to an oncologist, a therapist, or a divorce attorney.

And there were a myriad of alternative options available to verify the efficacy of the character limit. For example, petitioners could, consistent with the Fourth Amendment, have compared the phone numbers on Officer Quon's bill against a list of Department phones. Compare *Katz* v. *United States*, 389 U.S. 347 (1967) (prohibiting the government from bugging a public telephone booth without a warrant), with *Smith* v. *Maryland*, 442 U.S. 735 (1979) (permitting the use of a pen register device to capture phone numbers dialed because that information is conveyed to the phone company). If the government found that Officer Quon frequently and consistently texted non-Department phones—such as his wife's—petitioners would have fulfilled the character-limit purpose of their audit.

Alternatively, the Department could have asked Officer Quon to review the messages himself and reveal work-related messages totaling more than 25,000 characters in a month. If he could not do so, the Department would know that the existing character limit was appropriate; if he produced messages exceeding the limit, the Department would know that the limit was too low. Pet. App. 35-36. Because the government could have fulfilled its interest fully without reviewing the messages itself, the approach it chose was excessively intrusive and violated the constitutional standard.

D. Because The Search Of The Officers' Text Messages Was Unreasonable, Petitioners Also Violated The Fourth Amendment Rights Of The Private Individuals Who Sent Messages To The Officers.

If petitioners' search of Officer Quon's text messages violated his Fourth Amendment rights, then it also violated the Fourth Amendment rights of the persons who sent messages to him. As we have discussed (at pages 14-15, *supra*), the sender of a message does not lose his Fourth Amendment protection the moment the message is sent. If the content of the message is not obtained through voluntary disclosure by the recipient or compelled disclosure in compliance with the Fourth Amendment, the sender's rights are violated as well. The government must obtain access from either sender or recipient in a manner that comports with the Fourth Amendment.

On the other hand, if, contrary to our position, petitioners did not violate Officer Quon's Fourth Amendment rights in obtaining the messages, then the other respondents cannot claim that their constitutional rights were violated. The government's legitimate acquisition of the messages vitiates any constitutional claim that the senders otherwise could assert.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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Supreme Court of the United States

CITY OF ONTARIO, CALIFORNIA, et al.,

Petitioners,

v.

JEFF QUON, et al.,

Respondents.

On a Writ of Certiorari to
The United States Court of Appeals
for the Ninth Circuit

BRIEF OF *AMICI CURIAE* ELECTRONIC PRIVACY INFORMATION CENTER (EPIC) AND LEGAL SCHOLARS AND TECHNICAL EXPERTS IN SUPPORT OF THE RESPONDENTS

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INTEREST OF THE *AMICI CURIAE*[1]

The Electronic Privacy Information Center ("EPIC") is a public interest research center in Washington, D.C., which was established in 1994 to focus public attention on emerging civil liberties issues and to protect privacy, the First Amendment, and other Constitutional values.

EPIC has participated as *amicus curiae* in several cases before this Court and other courts concerning privacy issues, new technologies, and Constitutional interests, including *Doe v. Reed*, 529 F.3d 892 (9th Cir. 2008), *cert. granted*, 130 S. Ct. 1011 (U.S. Dec. 14, 2009) (No. 09-559); *Flores-Figueroa v. United States*, 129 S. Ct. 1886 (2009); *Herring v. United States*, 129 S. Ct. 695 (2009); *Crawford v. Marion County Election Board*, 128 S. Ct. 1610 (2008); *Hiibel v. Sixth Judicial Circuit of Nevada*, 542 U.S. 177 (2004); *Doe v. Chao*, 540 U.S. 614 (2003); *Smith v. Doe*, 538 U.S. 84 (2003); *Department of Justice v. City of Chicago*, 537 U.S. 1229 (2003); *Watchtower Bible and Tract Society of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150 (2002); *Reno v. Condon*, 528 U.S. 141 (2000); *National Cable*

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. *Amici* lodged with the Court Petitioners' and Respondents' letters of consent contemporaneous with the filing of this brief. In accordance with Rule 37.6, the undersigned states that no monetary contributions were made for the preparation or submission of this brief, and this brief was not authored, in whole or in part, by counsel for a party.

and Telecommunications Association v. Federal Communications Commission, 555 F.3d 996 (D.C. Cir. 2009); *Bunnell v. Motion Picture Association of America*, No. 07-56640 (9th Cir. filed Nov. 12, 2007); *Kohler v. Englade*, 470 F.3d 1104 (5th Cir. 2006) 470 F.3d 1104 (5th Cir. 2006); *United States v. Kincade*, 379 F.3d 813 (9th Cir. 2004), *cert. denied* 544 U.S. 924 (2005); and *State v. Raines*, 857 A.2d 19 (Md. 2003).

EPIC has a longstanding interest in workplace privacy[2] and electronic message privacy[3] and has worked on several public awareness campaigns regarding these topics. In 2009, EPIC submitted a brief[4] in *Bunnell v. MPAA*.[5] EPIC's *amicus* brief supported the application of the federal Wiretap Act's protections to email messages in circumstances when the messages are briefly stored while they pass through mail servers. In *Bunnell*, a former employee hacked his ex-employer's corporate email server to secretly swipe private emails as they were transmitted. EPIC argued that the Wiretap Act applies to these sorts of circumstances by barring "interception" of electronic communications. EPIC has long advocated for application of the

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[2] *See* EPIC: *Workplace Privacy*, http://epic.org/privacy/workplace/.

[3] *See* EPIC: *Gmail Privacy*, http://epic.org/privacy/gmail/faq.html.

[4] *See* EPIC: *Bunnel v. MPAA*, http://epic.org/privacy/bunnell/.

[5] *Bunnell v. Motion Picture Association of America*, No. 07-56640 (9th Cir. filed Nov. 12, 2007).

"interception" standard to email, and filed a 2004 *amicus* brief on this issue in *U.S. v. Councilman*.[6]

EPIC supports the right of public employees[7] to retain their privacy while engaging in personal communications while on the job. The Ninth Circuit's determination in the present case recognizes individuals' reasonable expectations of workplace privacy. Also, the Ninth Circuit established workable data minimization principles—principles that respect employees' expectations—in *Comprehensive Drug Testing*. If the Court overturns the Ninth Circuit in this case, it will dash millions of public employees' privacy expectations and subject personal communications to invasive government monitoring.

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[6] *United States v. Councilman*, 373 F.3d 197 (1st Cir. 2004).

[7] In *O'Connor v. Ortega*, 480 U.S. 709, 715 (1987), the Court held that "[s]earches and seizures by government employers or supervisors of the private property of their employees, therefore, are subject to the restraints of the Fourth Amendment." Similar searches by private employers are not typically subject to Fourth Amendment restraints.

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SUMMARY OF THE ARGUMENT

Government agencies may undertake reasonable searches of public employees, but they may not pursue unbounded searches of personal communications devices. Such activity is contrary to best practices in the security industry and would expose public employees to unnecessary risk. Modern communications devices reveal an extraordinary amount of personal data. The *Comprehensive Drug Testing* analysis describes a useful framework for safeguarding the privacy interests of public employees while providing government agencies the opportunity to undertake appropriate investigations.

ARGUMENT

I. Device Auditing Procedures that Do Not Respect Data Minimization Put Individuals At Risk

The principle of data minimization requires that auditors only collect and process personal information to the extent necessary to complete the audit. Strict adherence to this principle by public employers conducting investigatory searches is necessary to adequately protect the privacy and security of public employees.

A. Data Minimization is a Well-Established Principle of Information Technology Security

In 1973, the Department of Health, Education, and Welfare ("HEW") issued a report entitled "Records, Computers, and the Rights of Citizens." This report recommended that Congress enact legislation adopting a Code of Fair Information Practices for automated personal data systems.[8] The HEW report provides the basis for the principles of Fair Information Practices—principles that are now universally recognized.[9] The concept of data

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[8] U.S. Dep't. of Health, Education and Welfare, Secretary's Advisory Committee on Automated Personal Data Systems, Records, Computers, and the Rights of Citizens viii (1973).

[9] *See* Federal Trade Commission, *Fair Information Practice Principles*, http://www.ftc.gov/reports/privacy3/fairinfo.shtm.

minimization is inherent in Fair Information Practices. Data minimization requires that governments and other entities that collect and access individuals' personal information do so in a way that limits access and storage to the minimum amount of data necessary to accomplish a given task. Professor Spiros Simitis, while serving as the Data Protection Commissioner of the German state of Hesse, described this principle over 20 years ago:

> Personal information should only be processed for unequivocally specified purposes. Both government and private institutions should abstain from collecting and retrieving data merely for possible future uses for still unknown purposes. Both national and international organizations have in fact rejected the unlimited build-up of data files. In order to be retrieved, data must be necessary to a precise goal that is within the legally acknowledged activities of the organization interested in the information. A normative barrier thus prevents the technically possible multifunctional use of the data.[10]

Security experts agree that the best way to prevent loss or misuse of sensitive personal information is to avoid gathering or storing it in the

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[10] Spiros Simitis, *Reviewing Privacy in an Information Society*, 135 U. PA. L. REV. 707, 740 (1987).

first place.[11] In a proposed legal framework for government data mining, Fred H. Cate, professor of law and director of the Center for Applied Cybersecurity Research at the University of Indiana, suggests "[t]he use of data minimization and anonymization and other tools to limit the amount of information revealed to only what is necessary and authorized."[12] He goes further and identifies a number of tools and techniques so that "analysts can perform their jobs . . . without the need to gain access to personal data until they make the requisite showing for disclosure."[13]

One of the competitive advantages of leading firms and products in the electronic discovery sector is measured by how well they implement data minimization, that is, by how well they can search a corpus of information and return only those data elements that are relevant to the discovery.[14] Judging

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[11] Larry Dignan, *When it Comes to Data, Less is Better*, eWeek (May 3, 2005), http://www.eweek.com/c/a/Data-Storage/When-it-Comes-to-Data-Less-is-Better/.

[12] Fred H. Cate, *Government Data Mining: The Need for a Legal Framework*, 43 HARV. C.R.-C.L. L. REV. 435, 488 (2008).

[13] *Id.* at 488–89.

[14] *E.g.*, Hemanth Salem & James Ramsey, *Advanced Practices in Data Minimization*, Encore Discovery Solutions, http://www.encorelegal.com/discoveries/data_minimization.html; Inventus, *Case Study: In-House Data Minimization*, http://www.inventus.com/wp-content/uploads/2010/02/Inventus_Case-Studies_In-

by the wide availability of commercial technology products and services for data classification, protection and leak prevention, the state of technology is such that employers can investigate easily some elements of employee communications without gaining access to the content of the communications.

If sensitive information must be stored and accessed, the principle of data minimization requires that the smallest possible amount of information be used. Congress has acknowledged the importance of data minimization. For example, the amendments to the Foreign Intelligence Surveillance Act require adoption of minimization procedures as appropriate for all data acquisitions authorized under the section.[15] The definition of "minimization procedures" is set forth in two different portions of the statute, one for physical searches[16] and one for electronic surveillance.[17]

The two definitions include four types of procedures: procedures "reasonably designed in light of the purpose and technique of the particular surveillance, to minimize the acquisition and retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons;" procedures to prevent the unnecessary dissemination of

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House-Data-Minimization1.pdf; Modus, *Electronic Discovery*, http://www.discovermodus.com/ediscpdf.

[15] 50 U.S.C. § 1881a(e)(1) (2009)

[16] 50 U.S.C. § 1821(4) (2009).

[17] 50 U.S.C. § 1801(h) (2009).

nonpublicly available information "in a manner that identifies any United States person, without such person's consent;" procedures that require the disposal within 72 hours of the "contents of any communication to which a United States person is a party" acquired without a court order unless a new court order is obtained allowing retention, disclosure, or dissemination; and procedures that allow for exceptions to the retention and dissemination restrictions with respect to criminal evidence.[18] These terms demonstrate Congress's awareness that acquisition limitations are necessary but not sufficient, and that limitations on the government use of sensitive personal information are also required. These terms are mirrored in other statutes governing similar searches, including the provisions for investigatory wiretaps in the criminal context.[19]

B. In the Absence of Data Minimization, Public Employees Would Be Exposed to Unnecessary Risk

Data minimization is classified as a security method as much a privacy protection.[20] In fact, while speaking on a recent panel on Information Security Best Practices, two professors at the Wharton School of Business characterized the retention of personal

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[18] 50 U.S.C. § 1801(h) (2009).

[19] 18 U.S.C. § 2518(5) (2009).

[20] Dignan, *supra* note 11 (noting that minimization practices "won't end the theft of customer information, but it will limit what data there is to steal (or lose)").

data as "increasingly a liability for companies" concerned about the risks of data breaches.[21]

In 2008, a group of six security experts analyzed the Protect America Act of 2007,[22] the amendments to the Foreign Intelligence Surveillance Act, looking for potential security hazards of the statutory scheme. These researchers included Whitfield Diffie of Sun Microsystems and Peter G. Neumann, a well-known expert in information security. They concluded that "minimization matters," specifically finding that "[a]n architecture that minimizes collection of communications lowers the risk of exploitation by outsiders and exposure to insider attacks. . . . It should be fundamental to the system's design that the combination of interception location and selection methods minimizes the collection of purely domestic traffic."[23]

In *O'Connor v. Ortega*, this Court held that "public employer intrusions on the constitutionally protected privacy interests of government employees for . . . investigations of work-related misconduct should be judged by the standard of reasonableness."[24] Under the reasonableness

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[21] Forbes, *What Personal Data Should You Keep—And Toss?* (Mar. 19, 2009), *available at* http://www.forbes.com/2009/03/19/heartland-payment-security-entrepreneurs-sales-marketing-security.html.

[22] Pub. L. No. 110-55, 121 Stat. 552 (2007).

[23] Steven M. Bellovin, et al., *Risking Communications Security: Potential Hazards of the Protect America Act*, IEEE SECURITY & PRIVACY, Jan.–Feb. 2008, at 24, 31.

[24] *O'Connor v. Ortega*, 480 U.S. 709, 725 (1987).

standard, "one must determine whether the search as actually conducted 'was reasonably related in scope to the circumstances which justified the interference in the first place.'"[25] Given the widespread acceptance of data minimization as a principle of electronic security, an electronic search that fails to employ data minimization techniques is unreasonable.

II. Communications Devices Reveal Sensitive Personal Information

Employer-issued communications devices access sensitive personal information in a variety of ways. They are capable of accessing the internet, sending and receiving electronic messages, and collecting locational data.

A. Many Employers Issue and Monitor Sophisticated Communications Devices to Employees

Many employers pay for cellphones, smartphones, and laptops that are issued to employees. A recent *USA Today* poll found that 59% of professionals reported that their employer paid for the laptop they regularly use for work.[26] Fifty-six percent of professionals said that their employer paid for their smart phone.[27] Twenty-four percent said

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[25] *Id.* at 726 (quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1968)).

[26] Michelle Kessler, *Some Employees Buy Own Laptops, Phones for Work*, USA Today, June 16, 2008, *available at* http://www.usatoday.com/money/workplace/2008-06-15-electronic-devices-workplace_N.htm.

[27] *Id.*

that their employer paid for their regular cellphone.[28] And 21% of employees surveyed said that their employer paid for their Personal Digital Assistant.[29] The article also reported that since most employees are not going to use or carry two cellphones or laptops, company-issued equipment usually gets used for non-work purposes.[30]

The smartphones that employers often buy for employees boast a variety of features. Apple, the maker of the iPhone, boasts that

> iPhone uses fast 3G and Wi-Fi wireless connections to deliver rich HTML email, Maps with GPS, and Safari—the most advanced web browser on a mobile device. It has Google and Yahoo! search built in. And since iPhone multitasks, you can make a phone call while emailing a photo or surfing the web over a Wi-Fi or 3G connection.[31]

The iPhone includes features that allow users to make phone calls, send text messages, send emails, surf the internet, and play media files. Blackberry smartphones, products of Research in Motion, boast similar features. Blackberry devices allow users to send and receive email, send and receive text

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[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] Apple, *iPhone: Find Out Why You'll Love iPhone*, http://www.apple.com/iphone/why-iphone/.

messages and phone calls, instant message with friends and colleagues, browse the internet, use GPS applications, and play media files (among other things).[32] Palm and several other companies manufacture similar devices. These smartphones rely on a "3G" Network, which allows simultaneous use of speech and data services and higher data rates than older networks.

Ordinary cell phones also offer many of these features. Companies such as Motorola, Samsung, and LG offer cell phones that can access the internet, send and receive emails, make phone calls, and send and receive text messages.

At the same time that many employers are issuing mobile communication devices to employees, the employers are also monitoring those devices. A 2007 Electronic Monitoring Surveillance Survey by the American Management Association, polled employers, including public employers, about their companies' monitoring practices. More than half of employer respondents reported that their organization monitors all employees' internet usage.[33] An additional 14% indicated that the organization monitors the internet usage of selected categories of employees.[34] Twenty-eight percent of

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[32] Blackberry, *Blackberry Smartphones*, http://na.blackberry.com/eng/devices/.

[33] American Management Association, *Electronic Monitoring Surveillance Survey*, Feb. 2008, *available at* http://press.amanet.org/press-releases/177/2007-electronic-monitoring-surveillance-survey/.

[34] *Id.*

responding employers reported that they monitor all employees' computer use for time spent, matter/content, or keystrokes entered.[35] Another 17% reported that they monitor the computer use of selected job categories.[36] Twenty-five percent of employers reported that they store and review all employees' computer files.[37] Another 18% reported that they store and review some employees' computer files.[38]

Forty-three percent of employers reported that they monitored at least some employees' email.[39] Of those employers, 96% monitored external email (incoming and outgoing), and 58% monitored internal email (sent among employees).[40] One in ten of those employers reported that their employees do not know about the organization's policy of monitoring email.[41]

Forty-five percent of employers indicated that their organization monitors at least some employees' telephone usage (time spent and numbers called).[42] Sixteen percent of those employers report that their employees do not know about the organization's policy of monitoring telephone use.[43]

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[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *Id.*

B. Employer-Issued Communications Devices Reveal Internet Browsing History and Web Search Data

Mobile devices, including those issued by employers, have also become an increasingly popular way to access the internet. A 2009 Pew Research Center study reported that 55% of American adults connect to the internet wirelessly, either through a WiFi or WiMax connection via their laptops or through their handheld device like a smart phone.[44] The same study reports that more than half of 18- to 29-year-olds have accessed the internet wirelessly on a cell phone (55%). A global study conducted by market research firm Synovate found that 17% of respondents use internet browsing on their mobile phones, including 31% of U.K. respondents and 26% of U.S. respondents.[45]

These mobile devices can easily access web search and record web search history. Search engines are engaged in intense competition to provide default

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[44] Pew Research Center, *Internet, Broadband, and Cell Phone Statistics*, Jan. 5, 2010, *available at* http://www.pewinternet.org/Reports/2010/Internet-broadband-and-cell-phone-statistics.aspx.

[45] Synovate, *Global Survey Shows that Cell Phone is 'Remote Control' for Life*, Sept. 17, 2009, http://www.synovate.com/news/article/2009/09/global-survey-shows-cell-phone-is-remote-control-for-life-42-of-americans-can-t-live-without-it-and-almost-half-sleep-with-it-nearby.html.

search service on cell phones and smart phones.[46] Google and Bing competed with each other and a variety of other search engine companies to become the default searches for iPhones and Verizon mobile devices (respectively). [47] Companies such as Microsoft and Google have designed specialized search engines for cell phone and smart phone users.[48] Google advertises that its new version of Custom Search "enables a rich interactive mobile experience on high-end devices such as Android-powered phones, iPhone, iPod touch, and Palm Pre."[49]

C. Employer-Issued Communications Devices Reveal Messaging Data

Laptops, cell phones, and smart phones are all able to send messages to outside recipients. All three can employ email technology and all three are

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[46] Cade Metz, *Verizon Snuffs Google for Microsoft Search*, Register, Dec. 19, 2009, http://www.theregister.co.uk/2009/12/19/verizon_snuffs_google_for_bing.

[47] *Id.*; William Hobson, *How Smartphone Users Use E-commerce Sites Via Mobile*, Vertical Leap, Feb. 18, 2010, http://www.vertical-leap.co.uk/news/how-smartphone-users-use-ecommerce-sites-via-mobile/.

[48] Sharon Pian Chan, *Microsoft Unveils New Smartphone Software*, Seattle Times, Feb. 16, 2010, http://seattletimes.nwsource.com/html/microsoftpri0/2011096322_microsoftunveilsnewsmartphonesoftware.html.

[49] Google, *Google Custom Search for Your Smartphone*, Oct. 22, 2009, http://googlecustomsearch.blogspot.com/2009/10/google-custom-search-for-your.html.

capable of sending text messages; laptops can use email accounts to send text messages to mobile devices.

Many users take advantage of this technology and use mobile devices to send text messages. A 2009 study conducted by Consumers Union found that nearly 70% of respondents used their cell phones to send or receive text messages.[50] According to a Nielsen Mobile survey released 2008, for the second quarter of 2008, U.S. mobile subscribers sent and received on average 357 text messages per month.[51] Another study by CTIA Wireless Association found that over 740 billion text messages were sent over carrier networks in the U.S. during the first half of 2009.[52] That is 4.1 billion text messages being sent daily (nearly twice as many as were sent during the same period the previous year).

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[50] Consumer Union, *Consumer Reports Survey Found Cell-Phone Service Providers Among Lower-Rated Services*, Dec. 1, 2009, http://www.prnewswire.com/news-releases/consumer-reports-survey-found-cell-phone-service-providers-among-lower-rated-services-78272857.html.

[51] Neilson Wire, *In U.S., SMS Text Messaging Tops Mobile Phone Calling*, Sept. 22, 2008, http://blog.nielsen.com/nielsenwire/online_mobile/in-us-text-messaging-tops-mobile-phone-calling/.

[52] CTIA Wireless Association, *The Wireless Association Announces Semi-Annual Wireless Industry Survey Results*, Oct. 7, 2009, http://www.businesswire.com/portal/site/google/?ndmViewId=news_view&newsId=20091007006200&newsLang=en.

In a global study 17% of respondents reported using email on their mobile on a regular basis, including 26% in the US and 25% in the UK.[53] These findings were corroborated in another recent survey, where more than 20% of survey respondents reported using their cell phone to check email at least occasionally.[54]

D. Employer-Issued Communications Devices Reveal Locational Data

Many smartphones are equipped with Global Positioning ("GPS") capabilities. GPS is a satellite-based service that enables individuals to determine their precise location anywhere on Earth. The U.S. government operates GPS, and provides free access to the public.[55] Anyone can use an electronic device containing a GPS receiver to access GPS signals and determine their precise location, altitude, and speed.[56] Many smartphones, including Apple's iPhone, several Blackberry models, and Palm's Treo, have a built-in GPS receiver, which allows users to

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[53] Synovate, *supra* note 45.

[54] PC Pitstop, *Cell Phone & PC Usage Survey*, Jan. 2009, http://techtalk.pcpitstop.com/2009/01/26/cell-phone-pc-usage-survey-results/.

[55] 10 U.S.C. § 2281(b) (2009) (requiring the U.S. Dep't. of Def. to provide GPS "for peaceful civil, commercial, and scientific uses on a continuous worldwide basis free of direct user fees").

[56] U.S. Air Force, *Global Positioning System Fact Sheet*, http://www.losangeles.af.mil/library/factsheets/factsheet.asp?id=5325.

make use of GPS mapping and location-based check-in.[57]

Even employer-issued devices that do not have GPS capabilities can collect and maintain reasonably specific locational data. A phone, even when it is not engaged in an active call, can emit a roaming signal. This signal gets picked up by the next nearby cell phone antenna tower.[58] This reveals the cell phone's location. More detailed locational information can be obtained by interpolating signals between adjacent antenna towers.[59] Some services achieve a precision of down to 50 meters in urban areas where mobile traffic and density of antenna towers (base stations) is sufficiently high.[60] Rural and desolate areas may see miles between base stations and therefore determine locations less precisely.[61] This locational data is then held by phone companies. The data can be disclosed to law enforcement for legitimate purposes, including emergency services, but also poses a significant risk to privacy of phone users if it is disclosed without proper legal process.

Employer-issued mobile devices without GPS can also track individuals by using wireless internet connections. When a phone or other mobile device is in range of a wireless router, the router, which has a

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[57] *E.g.*, Blackberry, *GPS Capabilities*, *http://na.blackberry.com/eng/devices/features/gps.jsp*.

[58] *Mobile Phone Tracking*, Wikipedia, http://en.wikipedia.org/wiki/Mobile_phone_tracking.

[59] *Id.*

[60] *Id.*

[61] *Id.*

known geographic location, is then used to associate the phone with the geographic location.[62] This allows devices to be uniquely identified and associated with a particular location.

Hybrid methods are also used to track mobile devices. These methods use a combination of GPS, cell tower information, and wireless positioning. [63]

E. Users' Internet Browsing Histories, Search Data, Electronic Messages, and Locational Data are Sensitive Personal Information

Courts and legislatures recognize the sensitivity of information concerning individuals' internet browsing, web searches, electronic messages, and location. For example, federal laws prohibit private parties from intercepting Internet communications, bar companies from disclosing records of past Internet activity, and limit government access to users' data.[64] Federal courts recognize individuals' interests in keeping "their use of the Internet or other communications media" free from surveillance.[65]

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[62] Skyhook Wireless, *How it Works*, http://www.skyhookwireless.com/howitworks/.

[63] *Id.*

[64] *See, e.g.*, 18 U.S.C. § 2511 (2009) (prohibiting interception); 18 U.S.C. § 2702 (2009) (barring disclosure of stored communications); 18 U.S.C. § 3121(c) (2009) (limiting government access).

[65] *Gonzalez v. Google*, 234 F.R.D. 674, 678 (N.D. Cal. 2006).

To protect this privacy interest, courts often require litigants to de-identify or mask information that would identify users' internet browsing histories from documents disclosed during litigation.[66] Users' interests in freedom from surveillance are particularly acute when Internet search queries are disclosed. "Search queries themselves may constitute potentially sensitive information," implicating "privacy issues raised by [a government] request for the text of search queries."[67]

Federal law prohibits interception of Internet browsing activity, search data, and electronic messages.[68] The Wiretap Act provides for civil liability and criminal penalties against any person who "intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept any . . . electronic communication [except as provided in the statute]."[69] The Act imposes

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[66] *E.g.*, *Columbia Pictures v. Bunnell*, No. 06-1093, 2007 U.S. Dist. LEXIS 46364 at *47 (C.D. Cal. May 29, 2007); *Columbia Pictures v. Fung*, No. 06-5578, 2007 U.S. Dist. LEXIS 97576 (C.D. Cal. June 8, 2007); *see also Keith H. v. Long Beach Unified School District*, 228 F.R.D. 652, 657 (C.D. Cal. 2005) (noting "federal courts ordinarily recognize a constitutionally-based right of privacy that can be raised in response to discovery requests.").

[67] *Gonzalez*, 234 F.R.D. at 687.

[68] 18 U.S.C. § 2511 (2009).

[69] 18 U.S.C. § 2511(1)(a) (2009); *see also United States v. Steiger*, 318 F.3d 1039, 1047 (11th Cir. 2003); *Konop v. Hawaiian Airlines, Inc.*, 302 F.3d 868, 878 (9th Cir. 2002); *Steve Jackson Games, Inc. v. United States Secret Service*, 36 F.3d 457 (5th Cir. 1994) (defining

identical liability on any person who intentionally discloses the contents of an intercepted communication.[70] The Act also states:

> a person or entity providing an electronic communication service to the public shall not intentionally divulge the contents of any communication (other than one to such person or entity, or an agent thereof) while in transmission on that service to any person or entity other than an addressee or intended recipient of such communication or an agent of such addressee or intended recipient.[71]

Internet traffic, including browsing history, search data, and email and chat communications constitute "electronic communications."[72]

Federal law also prohibits disclosure of records detailing users' past Internet activities.[73] The Stored Communications Act prohibits service providers from

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"interception" as "acquisitions contemporaneous with transmission.").

[70] 18 U.S.C. § 2511(1)(c)-(d) (2009).

[71] 18 U.S.C. § 2511(3)(a) (2009)

[72] *In re Doubleclick Privacy Litigation*, 154 F. Supp. 2d 497, 508 n.18 (S.D.N.Y. 2001) (citing 18 U.S.C. § 2510(15) (2009) and 18 U.S.C. § 2510(12) (2009)).

[73] 18 U.S.C. § 2702 (2009).

"knowingly divulg[ing] to any person or entity the contents of a communication while in electronic storage by that service."[74] The Act provides for civil liability and criminal penalties for unlawful disclosure.[75] Courts have strictly construed the Act and prohibited disclosure of users' stored communications in a variety of circumstances, including in cases involving otherwise proper civil discovery subpoenas.[76]

Similarly, locational data receives special protection. Courts require law enforcement officers to obtain a warrant before tracking drivers—even when they travel openly on public roads.[77] Locational information is particularly sensitive because it can reveal:

> . . . a detailed record of travel to doctors' offices, banks, gambling casinos, tanning salons, places of worship, political party meetings, bars, grocery stores, exercise

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[74] 18 U.S.C. § 2702(a)(1) (2009).

[75] 18 U.S.C. § 2701 (2009); 18 U.S.C. § 2707 (2009).

[76] *See, e.g., Theofel v. Farey-Jones*, 359 F.3d 1066 (9th Cir. 2004); *In re Subpoena Duces Tecum to AOL, LLC*, 550 F. Supp. 2d 606, 609 (E.D. Va. 2008); *FTC v. Netscape*, 196 F.R.D. 559, 559, 561 (N.D. Cal. 2000).

[77] *Commonwealth v. Connolly*, 454 Mass. 808, 810 (Mass. 2009); *People v. Weaver*, 12 N.Y.3d 433, 445 (N.Y. 2009); *State v. Jackson*, 76 P. 3d 217, 223 (Wash. 2003); *State v. Campbell*, 759 P.2d 1040, 1048 (Or. 1988). *But see United States v. McIver*, 186 F.3d 1119, 1127 (9th Cir. 1999); *United States v. Jones*, 451 F. Supp. 2d 71, 88 (D.D.C. 2006).

> gyms, places where children are dropped off for school, play, or day care, the upper scale restaurant and the fast food restaurant, the strip club, the opera, the baseball game, the 'wrong' side of town, the family planning clinic, and the labor rally.[78]

The Supreme Court of Washington observes that locational data receives greater legal protection than other types of information because it "can reveal preferences, alignments, associations, personal ails and foibles."[79] It can "provide a detailed picture of one's life."[80]

III. The *Comprehensive Drug Testing* Framework Should be Broadly Applied

In *Comprehensive Drug Testing v. United States*,[81] the Ninth Circuit established specific data minimization requirements for electronic data searches by law enforcement officers. This framework sets out a strong set of principles for digital searches that allows the government to pursue appropriate investigations while ensuring that access to electronic data does not become unbounded. The facts of the text messaging case now before the Supreme Court show how the government's interest in recovering the payment for the text messaging services can be satisfied without allowing the search of the content of the messages.

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[78] *State v. Jackson*, 76 P. 3d at 262.

[79] *Id.*

[80] *Id.*

[81] 579 F.3d 989 (9th Cir. 2009).

A. The Ninth Circuit Established Workable Data Minimization Principles for Digital Search Cases

1. Comprehensive Drug Testing: The Framework

Comprehensive Drug Testing v. United States outlines five principles relating to government examination and seizure of electronic files:

> 1. Magistrates should insist that the government waive reliance upon the plain view doctrine in digital evidence cases.
>
> 2. Segregation and redaction must be either done by specialized personnel or an independent third party. If the segregation is to be done by government computer personnel, it must agree in the warrant application that the computer personnel will not disclose to the investigators any information other than that which is the target of the warrant.
>
> 3. Warrants and subpoenas must disclose the actual risks of destruction of information as well as prior efforts to seize that information in other judicial fora.
>
> 4. The government's search protocol must be designed to uncover only the information for which it has probable cause, and only that information may be examined by the case agents.

> 5. The government must destroy or, if the recipient may lawfully possess it, return non-responsive data, keeping the issuing magistrate informed about when it has done so and what it has kept.[82]

These principles create a workable solution for the problem of searching and seizing irrelevant information contained in electronic data. The second and fourth principles are especially relevant to the case before the Court, as they recognize the importance of minimizing the intrusion on privacy by minimizing the search of irrelevant data.

Citing *United States v. Tamura*,[83] in which the court delineated procedural guidelines for seizing "intermingled documents" at the scene of a search, *Comprehensive Drug Testing* updates the *Tamura* principles to "apply to the daunting realities of electronic searches . . . ."[84] One legal scholar wrote that the *Tamura* rules are "well suited to the practical considerations involved in searching through computer memory."[85] According to the Ninth Circuit, "everyone's interests are best served if there are clear rules to follow that strike a fair balance between the legitimate needs of law enforcement and

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[82] *Comprehensive Drug Testing*, 579 F.3d at 1006.

[83] 694 F.3d 591 (9th Cir. 1982).

[84] *Comprehensive Drug Testing*, 579 F.3d at 1006.

[85] Raphael Winick, *Searches and Seizures of Computers and Computer Data*, 8 HARV. J.L. & TECH 75, 107 (1994).

the right of individuals and enterprises to the privacy that is at the heart of the Fourth Amendment."[86]

Comprehensive Drug Testing involved an electronic search of records resulting from a federal investigation into the use of performance-enhancing drugs by professional baseball players. After federal authorities learned that ten baseball players had tested positive for steroids in their urine samples administered by Comprehensive Drug Testing, Inc. ("CDT"), the government obtained a warrant authorizing the search of CDT records pertaining to those ten players.[87] However, when the search was executed, the government seized and reviewed drug testing records for hundreds of players in Major League Baseball.[88] Evaluating the three judicial orders involved, the Ninth Circuit found that "this was an obvious case of deliberate overreaching by the government in an effort to seize data . . . ."[89]

The court went on to explain that the government failed to adhere to procedures outlined in *United States v. Tamura*.[90] Because searches of electronic records are becoming increasingly prevalent, the Ninth Circuit proffered five data minimization techniques to follow when the government wishes to "examine a computer hard drive or electronic storage medium in searching for

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[86] *Id.*; *see also* U.S. CONST. amend. IV.

[87] *Comprehensive Drug Testing*, 579 F.3d at 993.

[88] *Id.*

[89] *Id.* at 1000.

[90] *See Tamura*, 694 F.3d 591.

certain incriminating files . . . ."[91] The guidelines include having an independent third party segregate and redact the electronic documents, and creating a search protocol that only uncovers relevant information for which the government has probable cause.[92]

While at least one of the prescriptions proffered by the Ninth Circuit has been met with criticism,[93] the guidelines, as a whole, serve as a useful framework for minimizing the search of data in cases involving electronic devices and information. *Comprehensive Drug Testing* highlights the importance of data minimization in electronic searches, and other courts, whether or not they

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[91] *Comprehensive Drug Testing*, 693 F.3d at 1006.

[92] *Id.*

[93] *See, e.g.*, *Recent Case: Fourth Amendment - Plain View Doctrine - En Banc Ninth Circuit Holds that the Government Should Waive Reliance on Plain View Doctrine in Digital Contexts. -* United States v. Comprehensive Drug Testing, Inc., *579 F.3d 989 (9th Cir. 2009) (en banc)*, 123 HARV. L. REV. 1003 (2010) ("In effect, [one of the] requirement[s] would eliminate the plain view doctrine in electronic discovery cases. Such broad prescriptions are both unnecessary to the court's decision and detrimental to what would otherwise be legitimate searches by law enforcement agents."); *United States v. Mann*, 592 F.3d 779 (7th Cir. 2010) ("Although the Ninth Circuit's rules provide some guidance in a murky area, we are inclined to find more common ground with the dissent's position that jettisoning the plain view doctrine entirely in digital evidence cases is an 'efficient but overbroad approach.'" (internal citation omitted)).

followed the specific guidelines of the Ninth Circuit, have also recognized the value of data minimization principles to a person's privacy.

2. *Comprehensive Drug Testing*: Progeny

Since *Comprehensive Drug Testing* was decided just a few months ago, other courts have followed the Ninth Circuit's guidelines and required specific protocols for data minimization relating to electronic searches. A New York federal district court in *United States v. Cioffi*[94] recognized that "[t]he dawn of the Information Age has only heightened those concerns [about privacy.]"[95] In finding that a warrant the FBI relied upon in searching a defendant's personal email account was unconstitutionally broad, the court outlined ways that other courts and commentators "have wrestled with how best to balance privacy interests and legitimate law-enforcement concerns in the context of computer searches."[96] Turning to a law review article as guidance, the court noted that one way to minimize the search of electronic data is to specify a search protocol at the outset and to use key word searches to extract only relevant files.[97] Further, according to the court, the creation of firewalls would prevent investigators from obtaining computer files before a third party has segregated

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[94] 2009 U.S. Dist. LEXIS 99409 (E.D.N.Y. Oct. 26, 2009).

[95] *Id.* at *14.

[96] *Id.*

[97] *See* Winick, *supra* note 85.

relevant from non-relevant files.[98] Quoting *Comprehensive Drug Testing*, "segregation and redaction must be either done by specialized personnel or an independent third party [and t]he Government's search protocol must be designed to uncover only the information for which it has probable cause, and only that information may be examined by the case agents."[99]

The court in *United States v. Kim*[100] followed the reasoning and guidelines in *Comprehensive Drug Testing* to suppress evidence of an electronic search that uncovered child pornography. In *Kim*, the Government executed a search warrant and searched defendant Kim's hard drives, laptop, and desk computers, for evidence of "computer intrusion," as described in 18 U.S.C. § 1030.[101] While searching Kim's electronic files, the Government came across JPEG files believed to be child pornography, and charged Kim with an additional count of possessing child pornography.[102] Kim moved to suppress the evidence, and the court did so, citing *Comprehensive Drug Testing* to say that the Government's actions were "an obvious case of deliberate overreaching by

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[98] *Cioffi*, 2009 U.S. Dist. LEXIS 99409, at *15.

[99] *Id.* at *15-16 (*quoting Comprehensive Drug Testing v. United States*, 579 F.3d 989, 1006 (9th Cir. 2009)).

[100] 2009 U.S. Dist. LEXIS 121871 (S.D. Tex. Dec. 24, 2009).

[101] *Id.*

[102] *Id.*

the government in an effort to seize data . . . ."[103] The court reasoned that the Government's search was "clearly not conducted in accordance with the narrow guidelines promulgated in *Comprehensive Drug Testing*," and suggested the agent could have minimized the data searched by relying on the files' last created or modified date, which reflects the last date a file was manipulated, rather than last access date of the files.[104]

B. Courts Recognized the Importance of Data Minimization Principles Relating to Electronic Data Even Before Comprehensive Drug Testing

Electronic storage contains a "greater quantity and variety of information than any previous storage method," making computers and other electronic devices the subject of searches for incriminating information.[105] In *Andresen v. Maryland*,[106] the Supreme Court recognized the importance of privacy in searching such devices. The Court likened a search of telephone records to a search of a person's private papers, stating that, "In both kinds of searches, responsible officials, including judicial officials, must take care to assure that they are conducted in a

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[103] *Id.* at *43 (*quoting Comprehensive Drug Testing*, 579 F.3d at 1000).

[104] *Id.* at *45-47.

[105] Winick, *supra* note 85.

[106] 427 U.S. 463 (1976).

manner that minimizes unwarranted intrusions upon privacy."[107]

The Fifth Circuit and the United States Secret Service in *Steve Jackson Games v. United States Secret Service*[108] emphasized the value of keyword searches as a data minimization technique. The court found that the risk of searching irrelevant documents is lessened in the context of electronic communications, because "technology exists by which relevant communications can be located without the necessity of reviewing the entire contents of all of the stored communications . . . . For example, the Secret Service claimed . . . that it reviewed the private e-mail on the BBS by use of key word searches."[109]

The Tenth Circuit in *United States v. Carey*[110] recognized that computers often contain "intermingled documents," and set forth several principles for the Government to follow when handling massive quantities of electronic data.[111] Law enforcement officials in *Carey* exceeded the scope of their warrant to search the defendant's computers for evidence of possible sale and possession of cocaine, by opening files containing

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[107] *Id.* at 482.

[108] 36 F.3d 457 (5th Cir. 1994).

[109] *Id.* at 463. *See also* Winick, *supra* note 85 ("Whenever possible, key word searches should be used to distinguish files that fall within the scope of a warrant from files that fall outside the scope of a warrant.").

[110] 172 F.3d 1268 (10th Cir. 1999).

[111] *See also United States v. Tamura*, 694 F.2d 591, 595-96 (9th Cir. 1982).

child pornography.[112] According to the court, "law enforcement must engage in the intermediate step of sorting various types of documents and then search the ones specified in the warrant."[113] In accordance with this approach, the Tenth Circuit proffered several methods of data minimization to ensure that only relevant electronic documents are searched: "observing file types and titles listed on the directory, doing a key word search for relevant terms, or reading portions of each file stored in the memory."[114]

Similarly, the court in *United States v. Stierhoff*[115] found that defendants maintain a "legitimate expectation of privacy" in contents of non-relevant electronic files that are unrelated to the original purpose of a government search. In *Stierhoff*, the defendant consented to a search of a specific folder on his computer for evidence of stalking, but was subsequently indicted for tax evasion once an IRS computer specialist discovered evidence of tax fraud in a folder outside the specified directory.[116] The court granted a motion to suppress the evidence of tax evasion, citing *Carey* to state that "[w]here offices come across relevant documents so intermingled with irrelevant documents that they cannot feasibly be sorted at the site, the officers may seal or hold the documents pending approval by a magistrate of the conditions and limitations on a

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[112] *Carey*, 172 F.3d at 1270-71.

[113] *Id.* at 1275.

[114] *Id.* at 1276.

[115] 477 F. Supp. 2d 423 (D.R.I. 2007).

[116] *Id.* at 426-27.

further search through the documents."[117] Recognizing that "individuals undoubtedly have a high expectation of privacy in the files stored on their personal computers,"[118] the court found that although the defendant gave consent to search one folder on his computer, he maintained an expectation of privacy as to the contents of other files and folders on his computer.[119]

The principles set forth in *Comprehensive Drug Testing* provide guidance to the Government on how to minimize the search of irrelevant information in electronic data. These principles, which have been accepted by several other courts, balance the government's need to search against the privacy rights of citizens. This Court should consider the importance of search minimization in protecting against unwarranted intrusions on privacy.

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[117] *Carey*, 172 F.3d at 1275.

[118] *U.S. v. Adjani*, 452 F.3d 1140, 1146 (9th Cir. 2006).

[119] *Stierhoff*, 477 F. Supp. 2d at 443.

CONCLUSION

Amici respectfully request this Court to grant Respondents' motion to affirm the decision of the lower court.

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March 23, 2010

AMICUS CURIAE BRIEF

No. 08-1332

In The
Supreme Court of the United States

CITY OF ONTARIO, ONTARIO POLICE DEPARTMENT, and LLOYD SCHARF,

Petitioners,

v.

JEFF QUON, JERILYN QUON, APRIL FLORIO, and STEVE TRUJILLO,

Respondents.

On Writ Of *Certiorari* To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE LEAGUE OF CALIFORNIA CITIES AND CALIFORNIA STATE ASSOCIATION OF COUNTIES, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS CITY OF ONTARIO, ONTARIO POLICE DEPARTMENT, AND LLOYD SCHARF

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BRIEF ON BEHALF OF THE LEAGUE OF CALIFORNIA CITIES AND THE CALIFORNIA STATE ASSOCIATION OF COUNTIES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

The League of California Cities and California State Association of Counties respectfully submit this brief on the merits as *amici curiae* in support of Petitioners.

INTERESTS OF *AMICI CURIAE*[1]

The League of California Cities (League) is an association of 474 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, which is comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies

[1] Pursuant to Rule 37.3(a) of the Rules of the Supreme Court of the United States, the parties have consented to the filing of this brief. Pursuant to this Court's Rule 37.6, this brief was not authored in whole or in part by counsel for any party, and no person or entity other than the *amici curiae* made a monetary contribution to this brief's preparation or submission.

those cases that are of statewide – or nationwide – significance. The Committee has identified this case as being of such significance.

The California State Association of Counties (CSAC) is a non-profit corporation with membership consisting of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsel's Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

The *amici*, as representatives of local public entities throughout California, have a vital interest in ensuring that public entities as employers can adequately supervise the workplace and, among other things, ensure their electronic equipment purchased with taxpayer funds is used principally to serve taxpayers', not personal, interests.

SUMMARY OF ARGUMENT

The City of Ontario has a written policy governing the use of City computers, the Internet and email. This policy, which covers the use of City pagers, prohibits the use of City-owned electronic equipment for personal use, except for light personal use, and clearly states that users have no expectation of

privacy or confidentiality when using such equipment. In spite of this written policy, the Ninth Circuit held that Sergeant Jeff Quon, an Ontario SWAT officer, had a reasonable expectation of privacy in the text messages archived for the City by its wireless service provider. The holding was based on the court's conclusion that a mid-tier supervisor's preferred approach for addressing pager text accounts superseded the City's written policy.

But the operational realities of the police department demonstrate that, even in light of the one supervisor's approach, Sergeant Quon's expectation of privacy in the text messages was not reasonable. The City Manager had established a written policy. His policy supersedes any practices of subordinate employees. Moreover, the text messages are potentially disclosable pursuant to a public records request to the City. And the text messages were sent to and archived by a private third party. Thus, Quon had no access or control over the text messages once he sent them.

The issue presented must be addressed in a way that allows public employers to effectively manage their workplaces. The Ninth Circuit's holding would require that public employers obtain a search warrant before reviewing their own electronic text data. Such a requirement is manifestly unworkable and would impede supervisorial reviews. Warrants will be sought only in the most extreme cases where substantial harm to the public agency has already occurred. The workplace interests will have already

been subverted, and the taxpayers' interests will have already been compromised.

ARGUMENT

I. QUON HAD NO REASONABLE EXPECTATION OF PRIVACY IN TEXT MESSAGES SENT ON A CITY-ISSUED PAGER BASED ON THE REALITIES OF THE WORKPLACE

Assuming the Fourth Amendment protects pager text messages in general, the question is whether it is reasonable for a public entity, acting as an employer, to access the text messages. The reasonableness of a search is based on the nature of the privacy interest involved in the search, the character of the intrusion complained of, and the nature and immediacy of the governmental concern at issue and the efficacy of the means for meeting it. *Vernonia School District 47J v. Acton*, 515 U.S. 646, 654, 658, 660, 115 S.Ct. 2386, 2391, 2393, 2394, 132 L.Ed.2d 564 (1995).

A. A City Employee Could Not Reasonably Expect a Police Lieutenant's Informal, Oral Billing Practice Could Nullify the City Manager's City-Wide Written Electronic Communications Policy

The Fourth Amendment does not protect subjective expectations of privacy. *United States v. Jacobsen*,

466 U.S. 109, 122-123, 104 S.Ct. 1652, 1661, 80 L.Ed.2d 85 (1984). Rather, the Fourth Amendment only protects expectations of privacy that society is prepared to consider reasonable. *Id.* at 113, 104 S.Ct. at 1656. Thus, a legitimate expectation of privacy means more than a subjective expectation of not being discovered. *Id.* at n. 22.

Where, as here, a public entity maintains a written policy stating that only light personal use of the City's computer-related equipment is permitted and providing that the City reserves the right to monitor all network activity, email, and Internet use without notice and that "[u]sers should have no expectation of privacy or confidentiality when using these resources" (Appendix to Petition for Writ of *Certiorari* (Pet. App.) at 152), an employee can have no reasonable expectation of privacy in the pager text messages he sends on his City-issued pager. Yet the Ninth Circuit held that Sergeant Quon did have a reasonable expectation of privacy in the text messages. The court found that the informal practice initiated by Lieutenant Duke to streamline the accounting functions for the City-issued pagers created an expectation of privacy. *Quon v. Arch Wireless Operating Company, Inc.*, 529 F.3d 892, 907 (9th Cir. 2008), Pet. App. at 31. But the court's conclusion ignores the operational realities of the police department and the City.

The decision-making authority of a general law city in California flows from the city council to the city manager to the various department heads. Cal.

Gov't Code §§ 36501, subd. (a), 34851, 34852 (West 2009), Ontario, California, Municipal Code art. I, §§ 2-3.102, 2-3.107, subd. (b)(1) (2010). The City of Ontario is a general law city, with a city manager form of government. Ontario, California, Municipal Code art. I, § 2-3.101 (2010). The Ontario City Manager's duties include exercising control over all departments within the City and appointing the Police Chief. Ontario, California, Municipal Code art. I, §§ 2-3.107, subd. (b)(2), 2-3.204, subd. (a) (2010). The City Manager also exercises general supervision over the City's property. Ontario, California, Municipal Code art. I, § 2-3.107, subd. (j) (2010). In his supervisory capacity, the City Manager issued the "Computer Usage, Internet and E-Mail Policy" dated December 20, 1999, which was explicitly applicable to all employees. Pet. App. at 151. Quon signed the policy and attended a meeting at which the department told the SWAT officers the policy applied to the pagers. *Quon, supra*, 529 F.3d at 906, Pet. App. at 29.

Moreover, the City's Municipal Code establishes the Police Chief as the head of the police department, under the supervision of the City Manager. Ontario, California, Municipal Code art. I, §§ 2-3.201, 2-3.202 (2010). The City Manager's electronic communications policy specifically provided that "[i]n the event of a dispute as to what constitutes 'light' personal [use], the Agency Head or Department Director will determine if a specific e-mail fits the criteria of 'light' personal communications." Pet. App. at 153. Thus, based on the clear language in the written policy, the

Police Chief, not a lieutenant, had the authority to determine what constituted "light use."

It is well-settled that persons dealing with a city or public agency are charged with knowing the limitation of authority of its officers and agents. *See, e.g., City of Pasadena v. Estrin*, 212 Cal. 231, 235, 298 P. 14 (1931). The City Manager's written policy legally superseded Lieutenant Duke's billing practices, and the Police Chief had the duty and authority to review all police department electronic communications to determine whether those communications complied with the City Manager's policy. These are the "operational realities" that provide the context for Lieutenant Duke's statements to the SWAT officers. He told the officers that, if they paid the charges when they exceeded the minimum text character limits in a given month, *he* would not audit their text messages. *Quon, supra,* 529 F.3d at 907, Pet. App. at 30. Because a lieutenant clearly lacks the legal authority to set policy or override the City Manager's authority, no reasonable police officer could believe that neither the Police Chief nor the City Manager could audit the text messages. Consequently, any subjective expectation of privacy Sergeant Quon claims in the pager text messages is unreasonable.

B. It Is Unreasonable for a Public Employee to Believe that Records of a Public Agency Are "Private," Especially Under California Law

1. Public Records Include Electronic Media

Under the California Public Records Act (CPRA), public agencies must make their records available to the public upon request, unless the records are exempt from disclosure. Cal. Gov't Code §§ 6250-6276.48 (West 2009). Public records include "any writing containing information relating to the conduct of the public's business" that the public agency has prepared, uses or retains. Cal. Gov't Code § 6252, subd. (e) (West 2009). The CPRA defines "writing" very broadly, and includes emails, faxes and any other means of recording a communication, "and any record thereby created, regardless of the manner in which the record has been stored." Cal. Gov't Code § 6252, subd. (g) (West 2009).

Moreover, just months after the *Quon* decision was published, another published case discussed a public records request from the Detroit Free Press for police pager text messages. *Flagg v. City of Detroit*, 252 F.R.D. 346 (E.D. Mich. 2008). There, the plaintiff was seeking discovery of the pager text messages in a civil lawsuit. While the case was pending, the Detroit Free Press sought disclosure of the text messages from the City of Detroit's wireless service provider. *Id.* at 348. The Eastern District of Michigan noted, "[t]here is no question . . . that at least some of the

SkyTel text messages satisfy the statutory definition of 'public records,' insofar as they capture communications among City officials or employees 'in the performance of an official function.'" *Id.* at 355.

2. CPRA Requests Are Prevalent

The operational realities of municipalities in California include a constant need to process public records requests. Indeed, local police departments in California routinely receive and respond to CPRA requests. Inquiries often focus on fiscal issues, such as officer salaries and overtime pay. Some requests relate to a particular officer or incident, especially when the incident is considered newsworthy. SWAT units, by their nature, respond to high-profile situations that are often newsworthy. This increases the likelihood that local or even national interest in an incident will result in a CPRA request from the media.

Accordingly, based on the frequency of CPRA requests in general, and the high profile nature of SWAT units, it is likely that, at some point, the pager text messages would be the subject of a CPRA request.

The district court and the Ninth Circuit found the CPRA had no significant impact on the reasonableness of Quon's privacy expectation. *Quon, supra,* 529 F.3d at 907-908, Pet. App. at 31-33. But the fact that text messages may be subject to disclosure under the state Public Records Act is most certainly a

relevant operational reality and clearly suggests that an expectation of privacy in those text messages is unreasonable.

3. The Mere Process of Evaluating Whether Records Are Subject to Disclosure Makes Any Expectation of Privacy Unreasonable

The process of responding to public records requests further makes a public employee's expectation of privacy in electronic communications unreasonable. Given that text messages are "records" under the CPRA, an employee of an agency that receives a public records request for text messages would have to review the records for responsiveness. For example, if a fatal shooting involving SWAT officers occurred, a member of the press or public might request all text messages sent and received on the date of the incident. The CPRA contains very specific provisions governing what law enforcement records the agency must disclose. Cal. Gov't Code § 6254, subd. (f) (West 2009). Thus, to produce the responsive records, all text messages for all officers called to the scene would have to be reviewed to determine if any of the messages were exempt.[2]

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[2] This discussion assumes the City can retrieve its text messages from the wireless service provider. The Ninth Circuit found that the City could not, based on its interpretation of the Stored Communications Act, 18 U.S.C. §§ 2701-2711. This Court denied the service provider's petition for writ of *certiorari*, so the

(Continued on following page)

That process would be no different from the "search" that occurred with Quon's text messages here. The Police Chief directed a staff member to review the text messages to determine which ones related to City business and which were personal. *Quon, supra,* 529 F.3d at 897-898, Pet. App. at 6-8. None of the records were released to the public. But, had the need for reviewing the records arisen in a CPRA context, the records would potentially be viewed not only by staff, but also by the public. In fact, they could be published in a newspaper if they were responsive and not exempt. Even the sexually-explicit messages sent by Quon might be the subject of a CPRA request where, for instance, a member of the public was seeking to determine whether public money was being spent on the salary of a public employee who was not doing his job.[3] Accordingly, the potential for disclosure of the text messages under the CPRA makes any expectation of privacy in those messages unreasonable.

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validity of the Ninth Circuit's interpretation is not before the Court.

[3] It should be noted that a CPRA request analysis is complex and involves exceptions that must be reviewed on a case-by-case basis. A full discussion of the disclosure analysis is beyond the scope of this brief.

4. Text Messages Are Also Subject to Civil Lawsuit Discovery Requests

Besides being subject to a public records request, the SWAT pager text messages could also be subject to discovery in a civil lawsuit. In fact, a federal district court in Michigan held that electronically stored text messages exchanged among public agency officials and employees on agency-issued pagers were subject to discovery in a civil lawsuit. *Flagg v. City of Detroit*, 252 F.R.D. 346 (E.D. Mich. 2008). In this context, the Fourth Amendment would not apply. Federal civil rights lawsuits against governmental agencies are common, particularly when a police-inflicted injury occurs. The name for which the acronym "SWAT" stands – "Special Weapons and Tactics" – suggests the often violent situations that the officers routinely encounter. Thus, it is not uncommon for injuries to occur during such encounters and for a victim to sue the responding police department. As the *Flagg* case demonstrates, a SWAT officer's pager text messages could be subject to a civil discovery request. Therefore, based on these operational realities, Sergeant Quon's expectation of privacy in his text messages sent and received on his City-issued pager was further unreasonable.

C. The Technology Involved in Using a Pager System Makes Any Expectation of Privacy in the Text Messages Unreasonable

As noted in *Smith v. Maryland*, "[t]his Court consistently has held that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." *Smith v. Maryland*, 442 U.S. 735, 743-744, 99 S.Ct. 2577, 2582, 61 L.Ed.2d 220 (1979). Thus, where a person "exposes" his information to a third party, such as a telephone company, he assumes the risk that the company will reveal the information to the police. *Id.* at 744, 99 S.Ct. at 2582. As the Second Circuit found, although individuals do generally have a reasonable expectation of privacy in information stored on their home computers, "[t]hey may not, however, enjoy such an expectation of privacy in transmissions over the Internet or e-mail that have already arrived at the recipient." *United States v. Lifshitz*, 369 F.3d 173, 190 (2nd Cir. 2004).

In a case involving pager text, the court noted that "all messages are recorded and stored not because anyone is 'tapping' the system, but simply because that's how the system works. It is an integral part of the technology." *Bohach v. City of Reno*, 932 F. Supp. 1232, 1234 (D. Nev. 1996). Similarly here, the pager system that the City of Ontario used involved text messages being sent to Arch Wireless, where they were held temporarily until receiving pagers were ready to receive them. *Quon, supra,* 529 F.3d at 895-896, Pet. App. at 3-4. Once conveyed, the messages

were archived in the Arch Wireless system. *Quon, supra,* 529 F.3d at 896, Pet. App. at 3.

Furthermore, whether an expectation of privacy is reasonable also depends on the steps taken to ensure privacy and the extent of control the person exercised over the place searched. *See, e.g., Katz v. United States*, 389 U.S. 347, 351-352, 88 S.Ct. 507, 511-512, 19 L.Ed.2d 576 (1967). Here, Quon had no control over the text messages after he sent them. In fact, at no time during the transmission or storage were the messages in either Quon's or the City's control. *Quon v. Arch Wireless Operating Company, Inc.*, 445 F. Supp.2d 1116, 1131 (C.D. Cal. 2006), Pet. App. at 65. Rather, the messages could only be accessed after they were archived, and then only by the City, not by Quon. *Quon, supra,* 529 F.3d at 898, Pet. App. at 8-9. As the account representative for Arch Wireless stated, she "would only deliver messages to the 'contact' on the account, and . . . she would not deliver messages to the 'user' unless he was also the contact on the account." *Quon, supra,* 529 F.3d at 898, Pet. App. at 9. The contact here was the City.

Since the *Katz* decision in 1967, courts have found that, absent a search warrant, a public employee has a reasonable expectation of privacy in telephone calls, even those conducted on the employer's equipment. *Narducci v. Moore*, 572 F.3d 313, 323 (7th Cir. 2009); *Zaffuto v. City of Hammond*, 308 F.3d 485, 489 n.3 (5th Cir. 2002). But telephone conversations and pager text messages differ in key respects. First, a pager message produces a written record, which is

stored as part of the technology. *Quon, supra,* 529 F.3d at 895-896, Pet. App. at 3-4. Second, as the Sixth Circuit noted, "Unlike the phone conversation where a caller can hear a voice and decide whether to converse, one who sends a message to a pager has no external indicia that the message actually is received by the intended recipient." *United States v. Meriwether*, 917 F.2d 955, 959 (6th Cir. 1990). As a result, the confidentiality of pager messages is "quite uncertain." *Id.* Third, a telephone call produces a record of the number called and the date and time of the call, and an email contains the recipient's email address, along with the date and time of the email. In contrast, the only record of a pager text message is the message itself. Thus, the only method of determining which transmissions were work-related here was by actually looking at the transmissions. Joint Appendix on Writ of *Certiorari* (J.A.) at 142. Accordingly, Quon could not have a reasonable expectation of privacy in messages he could not even access and over which he had no control once they were sent.

II. A WARRANT REQUIREMENT IN THIS CONTEXT IS UNWORKABLE AND UNDULY BURDENSOME

A. A Warrant Requirement Would Compromise a Public Employer's Ability to Effectively Run Its Workplace

Under the Ninth Circuit's holding here, absent consent, a public employer would be precluded from searching the employee's private office for a file or

searching the employee's computer for data without a search warrant.

Consequently, an employer who needed a file for a non-investigatory work-related purpose could not search the employee's office, desk, or file cabinets if the employee was out to lunch, on vacation, or home sick, unless the employer obtained a warrant. Or, if an employee was suspected of downloading pornography using an agency-issued computer, the agency would be precluded from entering the employee's office and accessing the data files on the computer without a warrant.

B. A Search Warrant Is Impracticable for Workplace Investigations

The Ninth Circuit's holding creates an undue burden on public agencies by requiring them to seek a search warrant prior to conducting routine workplace investigations. But a public agency would not necessarily be able to obtain a warrant for such investigations. The Fourth Amendment states that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. Workplace investigations such as the one here do not involve criminal activity, even if an employee allegedly violated an agency policy. The need to search does not involve an administrative search pursuant to legislation, as with the OSHA inspectors in *Marshall*

v. Barlow's, Inc., 436 U.S. 307, 98 S.Ct. 1816, 56 L.Ed.2d 305 (1978) or an area inspection pursuant to a municipal code as in *Camara v. Municipal Court*, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967). Consequently, there would be no "probable cause" upon which the warrant could be based. Because the Fourth Amendment specifically states that no warrant may be issued "but on probable cause," no warrant could issue for purposes of workplace investigations.

Even if a government agency could obtain a warrant, the Ninth Circuit has created such onerous protocols for warrants pertaining to information contained on electronic storage media that doing so would be impractical for work-related searches. In *United States v. Comprehensive Drug Testing, Inc.*, 579 F.3d 989 (9th Cir. 2009), the Ninth Circuit set out the following guidelines for obtaining a search warrant for electronically-stored data:

> 1. Magistrates should insist that the government waive reliance upon the plain view doctrine in digital electronic cases. . . .
>
> 2. [Information should be segregated and redacted.] Segregation and redaction must be either done by specialized personnel or an independent third party. . . . If the segregation is to be done by government computer personnel, it must agree in the warrant application that the computer personnel will not disclose to the investigators any information other than that which is the target of the warrant.

> 3. Warrants and subpoenas must disclose the actual risks of destruction of information as well as prior efforts to seize that information in other judicial fora. . . .
>
> 4. The government's search protocol must be designed to uncover only the information for which it has probable cause, and only that information may be examined by the case agents. . . .
>
> 5. The government must destroy or, if the recipient may lawfully possess it, return nonresponsive data, keeping the issuing magistrate informed about when it has done so and what it has kept. *Id.* at 1006.

Attempting to comply with these protocols just to obtain a file on an employee's hard drive or the text messages at issue here would be nearly impossible. And, as Judge Callahan noted in her dissent, having to have dedicated staff or a consultant segregate and redact information will place an onerous financial burden on governmental entities, particularly smaller jurisdictions, that will have to have dedicated computer technicians or pay for outside consultants. *Id.* at 1013 (dissenting opinion of Callahan).

Thus, the Ninth Circuit's decision here eviscerates oversight of government employees and "improperly hobbles government employers from managing their workforces." *Quon v. Arch Wireless Operating Company, Inc.*, 554 F.3d 769, 774 (9th Cir. 2009), (dissenting opinion of Ikuta) denial of rehearing and rehearing *en banc*, Pet. App. at 137.

C. A Public Agency Acting as an Employer Is a "Special Needs" Situation for Which an Exception to the Warrant Requirement Should Apply

Justice Scalia's concurring opinion in *O'Connor v. Ortega* articulates a practical approach to work-related searches conducted by governmental agencies acting in their roles as employers. *O'Connor v. Ortega,* 480 U.S. 709, 107 S.Ct. 1492, 94 L.Ed.2d 714 (1987). First, he concluded that the Fourth Amendment generally protects the offices of government employees against a warrantless search. *Id.* at 731, 107 S.Ct. at 1505 (SCALIA, J., concurring in judgment). Justice Scalia then noted that the case turned on whether the intrusion was reasonable. *Id.* He stated that it was in the reasonableness analysis that the government's status as employer, and the employment-related character of the search, are relevant. *Id.* (SCALIA, J., concurring in judgment). Justice Scalia noted that, although warrantless searches are generally *per se* unreasonable, the Court has "recognized exceptions when 'special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable. . . .' *New Jersey v. T.L.O.*, 469 U.S. 325, 351, 105 S.Ct. 733, 749, 83 L.Ed.2d 720 (1985) (BLACKMUN, J., concurring in judgment). Such 'special needs' are present in the context of government employment." *Id.* (SCALIA, J., concurring in judgment). Accordingly, no search warrant would be required for work-related searches by public employers.

Justice Scalia's opinion recognizes that a public employer's need to function efficiently would be severely hampered if it must obtain a search warrant to conduct its daily business. "The government, like any other employer, needs frequent and convenient access to its desks, offices, and file cabinets for work-related purposes." *O'Connor v. Ortega, supra*, 480 U.S. at 731, 107 S.Ct. at 1505. (SCALIA, J., concurring in judgment). Justice Scalia concluded that work-related searches by a government employer do not violate the Fourth Amendment, regardless of whether the search is to retrieve files or conduct a work-related investigation: "I would hold that government searches to retrieve work-related materials or to investigate violations of workplace rules – searches of the sort that are regarded as reasonable and normal in the private-employment context – do not violate the Fourth Amendment." *Id.* (SCALIA, J., concurring in judgment). In contrast to the Ninth Circuit's holding here, Justice Scalia's opinion in *O'Connor v. Ortega* demonstrates a realistic understanding of how requiring a warrant for work-related searches would preclude government employers from effectively managing their workforces.

CONCLUSION

Because Sergeant Quon's expectation of privacy here was unreasonable, and the Ninth Circuit's holding is unworkable and unduly burdensome on public agencies as employers, the judgment of the Court of Appeals should be reversed.

Dated: February 11, 2010

Respectfully submitted,

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AMICUS CURIAE BRIEF

(9)

No. 08-1332

IN THE
Supreme Court of the United States

CITY OF ONTARIO, ONTARIO POLICE DEPARTMENT, AND LLOYD SCHARF,

Petitioners,

v.

JEFF QUON, JERILYN QUON, APRIL FLORIO, AND STEVE TRUJILLO,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF OF *AMICI CURIAE* LOS ANGELES TIMES COMMUNICATIONS LLC, THE PRESS-ENTERPRISE COMPANY, THE ASSOCIATED PRESS, THE E.W. SCRIPPS CO., THE CALIFORNIA NEWSPAPERS PUBLISHERS ASSOCIATION, THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, THE FIRST AMENDMENT COALITION AND CALIFORNIANS AWARE IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE* [1]

Amici Curiae are media and publishing organizations, who themselves or whose members own and operate newspapers, magazines, and television and radio stations in California and throughout the United States. The issues presented by this case, which involve the government's right to access and review communications created by a government employee on government time, using government equipment, potentially have broad application to all persons and entities interested in the conduct of government employees and the ability of the public and press to scrutinize government operations, including *Amici Curiae*.

As media and publishing organizations, *Amici Curiae* have a unique perspective concerning the government's obligations to disclose information about the conduct of public employees under the California Public Records Act and similar laws. These obligations require the government to review electronic and other communications in which its employees engage during their working hours, using government-provided equipment. The particular interests of *Amici Curiae* are further detailed below.

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[1] Pursuant to Rule 37.6, counsel for *Amici Curiae* declare that they authored this brief in total with no assistance from the parties. Additionally, no individuals or organizations other than the *Amici* made a monetary contribution to the preparation and submission of this brief. Written consent of petitioners and respondents to the filing of the brief has been filed with the Clerk. Respondent Debbie Glenn waived her right to respond on May 6 2009.

Los Angeles Times Communications LLC, dba *Los Angeles Times*, a privately owned corporation, publishes the *Los Angeles Times*, the largest metropolitan daily newspaper circulated in California. Los Angeles Times also publishes the *Newport Beach-Costa Mesa Daily Pilot*, *Glendale News-Press*, *Burbank Leader*, *Foothill Leader*, and the *Huntington Beach Independent*. The Times also maintains the website www.latimes.com, a leading source of national and international news.

The Press-Enterprise is a daily newspaper owned by Belo Corp., a media company with a diversified group of market-leading television broadcasting, newspaper publishing, cable news and interactive media operations in the United States. Belo owns nineteen television stations that reach 13.9% of U.S. television households, and publishes four daily newspapers, including the Press-Enterprise. In addition, Belo owns or operates seven cable news channels. Belo's Internet subsidiary, Belo Interactive, Inc., includes over 30 internet websites, several interactive alliances and a broad range of internet-based products.

The Associated Press ("AP") is a mutual news cooperative organized under the Not-for-Profit Corporation Law of New York. AP gathers and distributes news of local, national and international importance to its member newspapers and broadcast stations and to thousands of other customers in all media formats across the United States and throughout the world.

The E.W. Scripps Company is a diverse, 131-year-old media enterprise with interests in television

stations, newspapers, local news and information Web sites, and licensing and syndication. Nationwide, it operates daily newspapers in 14 markets (including the California papers the *Record Searchlight* (Redding) and the *Ventura County Star*), 10 local broadcast television stations, Internet news web sites related to the newspapers and broadcast stations, and a national licensing and syndication business that owns and license the marks for products such as *Peanuts* and *Dilbert*.

The California Newspaper Publishers Association ("CNPA") is a nonprofit trade association representing approximately 850 daily, weekly and student newspapers in California. For well over a century, CNPA has defended the rights of publishers to disseminate and the public to receive information about all records associated with government deliberations, including rights guaranteed by the First Amendment, the California Constitution and the California Public Records Act.

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance, and research in First Amendment litigation since 1970.

The First Amendment Coalition ("FAC") is a nonprofit public interest organization dedicated to advancing free speech and open government rights. A membership organization, FAC's activities include educational and informational programs, strategic

litigation to enhance First Amendment and access rights for the largest number of citizens, legal information and consultation services, and legislative oversight of bills affecting free speech. FAC's members are newspapers and other news organizations, bloggers, libraries, civic organizations, academics, freelance journalists, community activists, and ordinary individuals seeking help in asserting rights of citizenship.

Californians Aware is a nonprofit organization established to help journalists and others keep Californians aware of what they need to know to hold government and other powerful institutions accountable for their actions. Its mission is to support and defend open government, an enquiring press and a citizenry free to exchange facts and opinions on public issues.

STATEMENT

The City of Ontario provided pagers to its officers in the Ontario Police Department, including SWAT Sergeant Jeff Quon, to assist those officers in performing their responsibilities as public employees. In particular, Sergeant Quon's pager was intended for his use during emergency situations, to permit him to quickly and easily coordinate with other members of the police department. As a SWAT officer, likely to be called to duty during the most dangerous and unpredictable situations, his pager provided an important tool to facilitate communication between Sergeant Quon and his superiors, and with his subordinate officers, when other methods of communication might not be available or practical. Following an emergency or

critical incident, a review of messages sent and received by Sergeant Quon and other officers could reveal key information about the police department's and SWAT unit's response to a given situation, providing possibly the best source of information concerning actions taken by the police.

According to the record, Sergeant Quon used his pager for department communications. But he used it much more often to send personal messages to his wife, his mistress (who was also an employee of the police department) and another City officer. The vast majority of these personal messages were sent during working hours. For example, according to the record, on one day in August, he sent *eighty* messages – ten each hour, on average. During the one-month period reviewed by the City, Sergeant Quon's average was twenty-eight messages every day he worked. During that month, Sergeant Quon exceeded his 25,000 character limit by 15,158 characters – texting more than 40,000 characters in a single month.[2] Many of the messages were, as the trial court described them, "to say the least, sexually explicit in nature." A jury found that the City of Ontario reviewed the messages for valid, work-related reasons – including an audit to determine why Sergeant Quon was exceeding his monthly allowance by such a wide margin. The Ninth Circuit, however, rejected the jury's verdict, holding that reviewing Sergeant Quon's text messages invaded his privacy.

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[2] By way of comparison, this *Amicus Curiae* brief contains 41,599 characters, excluding the spaces (and not counting the caption or tables)

SUMMARY OF ARGUMENT

The California Public Records Act, as well as a panoply of other similar federal and state laws, imposes unique disclosure obligations on governmental agencies. These obligations undercut any public employee's claim to privacy in electronic communications conducted on government-issued equipment, for, in order to comply with the obligations, governmental agencies must have the ability to collect and review electronic records reflecting the conduct of their employees. Whether or not a private employer is restricted in its ability to review its employees' electronic communications – an issue that this Court need not reach – government employers necessarily must have the ability to do so.

The broad leeway that governmental agencies have to monitor their employees' conduct serves several salutary ends. As the California Public Records Act and other disclosure laws recognize, government employees often have a powerful ability to affect the lives of the citizens with whom they interact. Police officers, in particular, have tremendous power – including the special authority to exercise lethal force – which carries with it a high level of responsibility and accountability. The government has an obligation to the public to ensure that its employees, especially those placed in positions of power, do not abuse the trust placed in them. And even more basically, governmental agencies have an obligation to monitor their employees' activities to ensure efficiency and to enforce basic standards of acceptable conduct in the

workplace. Particularly now, as local and state governments are shedding employees, and trying desperately to balance budgets stretched thin by the troubled economy, governments should not be hamstrung from doing everything within their power to maintain an efficient, effective workforce.

ARGUMENT

THE NINTH CIRCUIT'S DECISION IS INCONSISTENT WITH THE GOVERNMENT'S OBLIGATIONS TO DISCLOSE INFORMATION ABOUT THE CONDUCT OF PUBLIC EMPLOYEES UNDER THE CALIFORNIA PUBLIC RECORDS ACT AND SIMILAR LAWS

This Court has held on several occasions that state and local laws allowing public access undercut an individual's claim that he has a reasonable expectation of privacy under the Fourth Amendment. *See Florida v. Riley*, 488 U.S. 445, 451 (1989) (plurality opinion) (search from helicopter was reasonable in part because the helicopter was legally in public airspace); *California v. Ciraolo*, 476 U.S. 207, 213 (1986) (no Fourth Amendment violation because property was viewed from airspace the public legally could navigate); *Dow Chemical Co. v. United States*, 476 U.S. 227, 239 (1986) (same). Thus, as the Fourth Circuit has put it, state statutory law "is relevant to the determination of whether there is a 'societal understanding' that [an individual] has a legitimate expectation of privacy in" particular records. *Doe v. County of Fairfax*, 225 F.3d 440, 450 (4th Cir. 2000) (citing cases). Such is the case here.

I. *The Government Must Have The Freedom To Review Its Employees' Communications To Comply With Its Obligations To The Public.*

California, like virtually every other state and the federal government, has a public records act that mandates the immediate disclosure, upon request of any member of the public, of records reflecting the functioning of state and local agencies. Cal. Gov't Code § 6250, *et seq.* The California Public Records Act ("CPRA") reflects a fundamental public policy in California to facilitate the public's strong interest in overseeing the actions of public officials. Yet despite this strong public policy, the Ninth Circuit reasoned that public records requests for the kind of information at issue here are not so widespread that an officer's reasonable expectation of privacy would be reduced as a result. The Ninth Circuit's conclusion underestimates the importance of public records acts in California and throughout the Nation, and fails to recognize the increasing importance of electronic communications in the conduct of government affairs.

A. *California Has A Strong Policy Favoring Public Access To Government Records.*

California, like the federal government and every other state,[3] has a public records act that

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[3] 5 U.S.C. § 552; Ala. Code 36-12-40 *et seq.*; Alaska Stat. 40.25.110 to .125; Ariz. Rev. Stat. Ann. 39-121 to -128; Ark. Code Ann. § 25-19-101 *et seq.*; Cal. Gov't Code §§ 6250 to 6270; C.R.S. 24-72-201 *et seq.*; Conn. Gen. Stat. § 1-200 *et seq.*; 29 Del. C. § 10001 *et seq.*; D.C. Code Ann. § 2-531 *et seq.*; Fla. Stat. Ann. 119.01 to 119.15; Ga. Code Ann. 50-18-70 to -77; Haw. Rev. Stat. § 92F-1 *et seq.*; Idaho Code 9-338 to -347; 5

reflects the state's strong public policy of providing public access to the actions of public employees. California enacted its public records act, the California Public Records Act (CPRA), Government Code §§ 6250 *et seq.*, nearly four decades ago. Seeking to ensure public access to information about its government, the Legislature declared:

> In enacting this chapter, the Legislature, mindful of the right of individuals to privacy, finds and declares that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state.

Cal. Gov't Code § 6250.

ILCS 140/1 – 140/11.5; Ind. Code Ann. 5-14-3-1 to -10; Iowa Code Ann. 22.1 to .14; Kan. Stat. Ann. 45-215 to -250; Ky. Rev. Stat. Ann. 61.870 to .884; La. Rev. Stat. Ann. 44:31-41; Me. Rev. Stat. Ann. 1-13 § 401-412; Md. Code Ann. State & Govt. 10-611 to -630; Mass. Gen. Laws Ann. Ch. 4, § 7, Ch. 66, § 10; MCL 15.231 *et seq.*; Minn. Stat. Ann. 13.03; Miss. Code Ann. 25-61-1 *et seq.*; Mo. Ann. Stat. 109.180 to .190; Mont. Code Ann. 2-6-101 to -111; Neb. Rev. Stat. §§ 84-1201-1227; Nev. Rev. Stat. Ann. 239.001 to .030; NHRev. Stat. 91-A:1-9; N.J.S.A. 47:1A-1 *et seq.*; 14-2-1 NMSA 1978 *et seq.*; NY Pub. Off. Law Sec. 84-90; N.C. Gen. Stat. 132-1 to -10; N.D. Cent. Code 44-04-18 to -32; Ohio Rev. Code. Ann. 149.43; Okla. Stat. Ann. Tit. 51.24A.1 to .29; Or. Rev. Stat. Ann. 192.410 to .505; Pa. Cons. Stat. Ann. Tit. 65 P.S. § 67.101 *et seq.*; R.I. Gen. Laws 38-2-1 to -15; S.C. Code Ann. § 30-4-10 *et seq.*; S.D. Codified Laws Ann. 1-27-1 to -45; Tenn. Code Ann. 10-7-503 *et seq.*; Texas Code § 552.001 *et seq.*; Utah Code. Ann. 63-2-201 to-207; 1 V.S.A. § 315-320; Va. Code § 2.2-3704; W. Va. Code S 29B-1-1 *et seq.*; Wash. Rev. Code Ann. 42.56.001 *et seq.*; Wis. Stat. Ann. 19.31 to .39; Wyo. Stat. Ann. 9-2-401-419, 16-4-201 *et seq.*

The CPRA recognizes a presumptive right of access to public records. And by its express terms, the CPRA extends to all forms of electronic data, including email and text messages. *See* Cal. Gov't Code § 6252(g) (defining writing to include "transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing any form of communication or representation"); *California Comm'n on Peace Officer Stds. & Training v. Superior Court*, 42 Cal. 4th 278 (2007) (ordering disclosure of records kept in electronic format).[4] Therefore, under the CPRA, Sergeant Quon's text messages were public records from their inception.

The CPRA gives citizens an important mechanism for scrutinizing government conduct. As the California Supreme Court has explained:

> Implicit in the democratic process is the notion that government should be accountable for its actions. In order to verify accountability, individuals must have access to government files. Such access permits checks against the arbitrary exercise of official power and secrecy in the political process.

CBS, Inc. v. Block, 42 Cal. 3d 646, 651 (1986). To achieve these goals, California's Supreme Court has declared that "[m]aximum disclosure of the conduct

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[4] Other states agree, even extending the reach of their public records acts to metadata where it reflects on the functioning of the government. *E.g., Lake v. City of Phoenix*, 218 P.3d 1004 (Ariz. 2009).

of governmental operations" is necessary. *Id.* at 651-652.

Californians reaffirmed this important principle in 2004 by overwhelmingly approving Proposition 59, which elevated the public's right of access to government records to the state Constitution.[5] Thus, the California Constitution now guarantees that:

> (b)(1) The people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny.
>
> (2) A statute, court rule, or other authority, including those in effect on the effective date of this subdivision, shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access....

Cal. Const., Art. I, § 3(b). With the passage of this constitutional amendment, the presumption in favor of public access to government records in California grew even stronger, putting it on the same level as state constitutional privacy rights. Agencies thus must now meet an even more rigorous standard to justify withholding such records. *See id.*, Analysis of Legislative Analyst.

Even before this constitutional amendment, it was well established that the CPRA embodies "a

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[5] *See* California Secretary of State, Ballot Measures, General Election, 11/2/04, available at www.vote2004.ss.ca.gov/Returns/prop/00.htm.

strong policy in favor of disclosure of public records, and any refusal to disclose public information must be based on a specific exception to that policy." *California State University v. Superior Court*, 90 Cal. App. 4th 810, 831 (2001). To justify secrecy, the government agency is required to demonstrate a "clear overbalance on the side of confidentiality." *Id.* (internal quotation marks omitted).

Moreover, even before it became a constitutional mandate, Cal. Const. Art. I, § 3(b)(2), it was well-established law in California that the CPRA's "[s]tatutory exemptions from compelled disclosure are narrowly construed." *Id.* As one court explained recently, "[s]ince disclosure is favored, all exemptions are narrowly construed." *County of Santa Clara v. Superior Court*, 170 Cal. App. 4th 1301, 1321 (2009) (citations omitted); *see also Board of Trustees of California State University v. Superior Court*, 132 Cal. App. 4th 889, 896 (2005) ("exemptions are to be narrowly construed, and the government agency opposing disclosure bears the burden of proving that one or more apply in a particular case") (citations omitted); *Braun v. City of Taft*, 154 Cal. App. 3d 332, 342 (1984); 68 Ops. Cal. Atty. Gen. 73, 1985 WL 167464 *3 (1985) ("[a]s with the other exemptions contained in Section 6254, the 'personnel' exception of subdivision (c) is to be read narrowly") (citations omitted).

Thus, even though the CPRA has an exemption protecting privacy interests, this exemption is extremely narrow. *See* Cal. Gov't Code § 6254(c) (exempting "[p]ersonnel, medical, or similar files, the disclosure of which would constitute an unwarranted

invasion of personal privacy"). The exemption "typically appl[ies] to public employee's personnel folders or sensitive personal information which individuals *must* submit to government." *Register Div of Freedom Newspapers v. County of Orange*, 158 Cal. App. 3d 893, 902 (1984) (internal quotation omitted). And California courts consistently have held that the *voluntary* disclosure of private information to the agency waives any privacy interest that may have existed in that information. *Id.* at 902-903.[6] Under this well-established principle, if any information is *truly* private and is not in the government's hands through a voluntary act, the law may exempt it from disclosure. Even under these circumstances, however, the agency must review its own records to fulfill its statutory obligation of determining whether any information is private, and if so, to weigh the privacy interests against any legitimate public interest in disclosure of the information requested. *See* Cal. Gov't Code § 6253.

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[6] *Accord Lorig v. Medical Board*, 78 Cal. App. 4th 462, 468 (2000) (psychiatrist's home address may be publicly disclosed when psychiatrist chooses to use the home address as her "address of record"); *see also Dobronski v. F.C.C.*, 17 F.3d 275, 279 (9th Cir. 1994) (holding that public employees' privacy interests in their sick leave records was minimal, and could not overcome the significant public interest in obtaining those records); *Lissner v. U.S. Customs Srvc.*, 241 F.3d 1220, 1223-1224 (9th Cir. 2001) (in interpreting law enforcement exemption, which provides exemption for personal information similar to that in the CPRA, the Ninth Circuit held that details regarding the arrest of city police officers for importing steroids was not private information, in part because "by becoming public officials, their privacy interests are somewhat reduced").

B. *Government Agencies May Not Avoid The CPRA By Adopting Policies That Would Render Public Documents Exempt From Disclosure.*

The Ninth Circuit held that Lieutenant Duke's statements to Sergeant Quon and others that he would not review the text messages if Sergeant Quon paid any overage charges stripped the Sergeant's messages of their public character and rendered them wholly private. Yet, even accepting the evidence concerning Lieutenant Duke's alleged promises at face value, the Ninth Circuit should not have given the statements any weight because they contravened the CPRA.

California courts have rejected attempts to turn public information into private information by virtue of a "promise" like the one allegedly made here. The courts have reasoned, and appropriately so, that if government agencies are permitted to make binding promises of confidentiality, public officials would have an easy means of avoiding the disclosure obligations imposed on them under the CPRA. Thus, for example, in *BRV, Inc. v. Superior Court*, 143 Cal. App. 4th 742, 748-749 (2006), the court noted the school district's promise to seal a school Superintendent's personnel file, but that did not dissuade the court from ordering disclosure of the report at issue there.

Similarly, in *San Gabriel Tribune v. Superior Court*, 143 Cal. App. 3d 762, 775 (1983), the court ordered disclosure of financial statements used to evaluate a rate increase granted to a disposal company that contracted with the city under a promise of confidentiality. As the court explained,

"[a]ssurances of confidentiality by the City to the Disposal Company that the data would remain private [were] not sufficient to convert what was a public record into a private record." *Id.*; *see also Register Div. of Freedom Newspapers*, 158 Cal. App. 3d at 909 (rejecting request "that settlement agreement should remain confidential because it was entered into with the expectation its provisions would remain confidential").

The California Supreme Court reached a similar result in *Williams v. Superior Court*, 5 Cal. 4th 337, 355 (1993), where it recognized that an agency may not shield a public record from disclosure by placing it in a file labeled "investigatory." *Accord New York Times Co. v. Superior Court*, 52 Cal. App. 4th 97, 103 (1997) (public scrutiny under CPRA may not be avoided by placing into personnel file what would otherwise be unrestricted information), *overruled in part by Copley Press, Inc. v. Superior Court*, 39 Cal. 4th 1272 (2006).

Nor is California unique in its interpretation of its public records act. Other states interpreting their own laws likewise have concluded that governmental agencies and employees cannot defeat public records laws by their own machinations. As the Wisconsin Supreme Court recently explained:

> [W]e cannot accept [the] argument that parties may, through the collective bargaining process, contract away the public's rights under Wis. Stat. § 19.35(1)(a). To hold otherwise would be contrary to the public interest, and would

> have the potential to eviscerate the Public Records Law through private agreements.

Milwaukee Journal Sentinel v. Wisconsin Dep't of Admin., 768 N.W.2d 700, 718 (Wis. 2009).[7]

Petitioners' written policies reflected the statutory reality in which they functioned. Under the CPRA, petitioners had no right to establish a policy that would exempt electronic data, including text messages, from the automatic disclosure requirements of the statute. Nor could they promise Sergeant Quon or any other officer any degree of confidentiality in the text messages sent or received during the course and scope of their employment. If such a promise were made, it would not have been enforceable, because any citizen, for any reason, had a right to demand copies of Sergeant Quon's text messages.

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[7] *See also Bradley v. Saranac Bd. of Ed.*, 565 N.W.2d 650, 658 (Mich.1997) (Michigan "FOIA requires disclosure of all public records not within an exemption," and "the defendant school district cannot eliminate its statutory obligations to the public merely by contracting to do so" with administrators) (quotation omitted); *Hearst Corp. v. Hoppe*, 580 P.2d 246, 254 (Wash. 1978) ("an agency's promise of confidentiality or privacy is not adequate to establish the nondisclosability of information; promises cannot override the requirements of the disclosure law") (citation omitted); *Hechler v. Casey*, 333 S.E.2d 799, 809 (W. Va. 1985) ("an agreement as to confidentiality between the public body and the supplier of the information may not override the Freedom of Information Act").

C. *Public Records Acts Inform Privacy Inquiries Regardless Of How Often The Acts Are Invoked.*

The Ninth Circuit dismissed Petitioners' reliance on the CPRA, reasoning that CPRA requests are not "so widespread or frequent as to constitute 'an open atmosphere so open to fellow employees or the public that no expectation of privacy is reasonable.'" Op. at 7024. But that reasoning misses the point. A public record belongs to the public, as established at its inception. It may be withheld from the public *only* if it fits within one of the narrow exemptions from the CPRA's automatic disclosure requirements – and the agency is obliged to review it to determine whether to invoke an exemption. Thus, if documents are within the scope of the CPRA, it necessarily follows that a public employee can have no reasonable expectation that the documents will be kept private from his or her employer.[8] The statute itself, in other words,

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[8] Even on the federal level, the Privacy Act of 1974 restricts the dissemination of individually identifiable records maintained by agencies, but its restrictions explicitly exclude any information that is open to the public under FOIA. See 5 U.S.C. § 552a(t)(2) ("[n]o agency shall rely on any exemption in [the Privacy Act] to withhold from an individual any record which is otherwise accessible to such individual under the provisions of [FOIA]"); *id.* § 552a(b)(2). The D.C. Circuit found that this exemption "represents a Congressional mandate that the Privacy Act not be used as a barrier to FOIA access." *Greentree v. United States Customs Serv.*, 674 F.2d 74, 79 (D.C. Cir. 1982); *Crumpton v. Stone*, 59 F.3d 1400, 1405 (D.C. Cir. 1995), *cert. denied*, 516 U.S. 1147 (1996). And although this is a statutory limitation, it represents sound policy – it makes little sense to create a privacy interest in information

undercuts any claim to privacy protection, regardless of how often it is actually invoked.

As this Court has held, whether or not an objectively reasonable expectation of privacy exists does not turn on whether a third party has previously shown interest in the allegedly private information. Thus, the Court held that the Fourth Amendment does not prohibit the warrantless search and seizure of garbage left for collection outside a home, rejecting the argument that the Fourth Amendment applied because "there was little likelihood that it would be inspected by anyone." *California v. Greenwood*, 486 U.S. 35, 39 (1988). As the Court explained, "[i]t may well be that respondents did not expect that the contents of their garbage bags would become known to the police or other members of the public," but "[a]n expectation of privacy does not give rise to Fourth Amendment protection ... unless society is prepared to accept that expectation as objectively reasonable." *Id.* at 39-40. Noting "the unanimous rejection of similar claims by the Federal Courts of Appeals," the Court found that any expectation of privacy in garbage left outside the curtilage of a home was not reasonable and thus beyond the Fourth Amendment's protection. *Id.* at 41.

The same reasoning applies here. Even if it is true that public records act requests are not prevalent enough to reduce Sergeant Quon's *subjective* expectation of privacy, it remains true

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which, by statute or state constitutional right, is open to the public.

that the information potentially is available to any member of the public who asks, and that any such request will prompt a review by Sergeant Quon's employer. Because Sergeant Quon had no right to control access to this information, he cannot have held a reasonable expectation that it would be private.[9]

II. *Public Records Acts Serve Many Beneficial Ends That Would Be Defeated By Allowing Public Employees – Especially Police Officers – To Keep Electronic Communications Private.*

There is a "paramount public interest in a free flow of information to the people concerning public officials, their servants." *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964). For this reason, "anything which might touch on an official's fitness for office is relevant," including issues such as "dishonesty, malfeasance, or improper motivation, even though these characteristics may also affect the official's private character." *Id.*; *see also Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272-274 (1971).

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[9] As one California court recently explained, information is private only if the individual retains the right to control who will learn that information. *Moreno v. Hanford Sentinel*, 172 Cal. App. 4th 1125, 1130 (2009). "[T]he claim of a right of privacy is not so much one of total secrecy as it is of the right to define one's circle of intimacy – to choose who shall see beneath the quotidian mask." *Id.* (citation, internal quotes omitted). Where information may be made available to the public under a state or federal public records act, however, it is not private information regardless of how many, or few, people have actually seen it. *Id.*

The current statutory scheme under the CPRA, as with other state and federal public records laws, balances the public's strong interest in information about the conduct of government officials against instances where legitimate countervailing interests exist. Against this backdrop, it is clear that government agencies must be permitted to review their employees' emails, text messages and similar data. Public records acts ensure that the public can oversee the operations of the government, and thereby heighten the obligation of government agencies to monitor their employees' activities and ensure that they are operating efficiently and effectively. The strong public policies that motivated every legislature in the nation to adopt a public records act strongly support Petitioners' actions here. Ultimately, the government's obligation to the public it serves, and the unique role of public employees within society, mandate that the government be given broad leeway in reviewing all electronic communications from public employees when they are acting on public time, using public equipment.

A. *In The Electronic Age, The Public's Ability To Review Communications Made Through Text Messages Or Other Electronic Devices Is Critical To Ensure Effective Oversight Of Government Agencies And Officials.*

The use of text messages and other forms of electronic communication has ballooned in recent years, as society has embraced instant messaging in both business and personal settings. Text messaging, in particular, has tremendous value

because it gives people the ability to relay vital information instantly. The City had good reason to provide pagers to its officers; when used properly, such pagers can be a valid use of public funds.

But the value of these devices goes well beyond the instant in which they are used. Pagers, like email, may provide a written record of events as they occur. They can help reconstruct an emergency situation for a variety of purposes, far more reliably than the memories of the participants, whose perceptions and recall may be skewed because of the stress of an emergency situation. The written record of such communications provides valuable information to the public and to individuals who might be impacted by the events.[10]

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[10] Thus, for example, enormous public interest was sparked when the website Wikileaks released more than half a million pager messages sent by New York City police officers, public officials, and members of the public at the time of the September 11 attacks. *See, e.g.*, Ed Pilkington, *Plane has hit WTC. Pls call, love your wife. Wikileaks publishes 570,000 messages capturing chaos of 9/11*, Guardian, Nov. 26, 2009, at 3 (noting that "[t]he massive archive includes thousands of messages from US officials including Pentagon workers and New York police, as well as members of the public from all over America, which together provide an insight into the initial chaos and confusion, followed by a dawning horror as 9/11 unfolded"); John Lauinger, *Thousands of 9/11 messages released*, N.Y. Daily News, Nov. 26, 2009, at 6 (noting that the messages "provid[ed] a chilling 'real-time' reminder of the terrorist attacks"). Public interest in the messages was so intense that several programmers created tools to search, analyze and visualize the messages sent on September 11. Jennifer Lee, *Digital Tools to Sift Through WikiLeaks' 9/11 Messages*, available at http://cityroom.blogs.nytimes.com/ 2009 /12/01/digital-tools-to-sift-through-wikileaks-911-messages.

E-mails and pagers also can reveal valuable information about the flaws in government – a key goal of the CPRA and other public records acts. Recently, for example, a California group filed a public records request for text messages sent by Orange County sheriff's officials during a 2008 Board of Supervisors meeting. When released, the text messages "show[ed] the law enforcement leaders using cell phones to ridicule activists and even supervisors during a public hearing on gun permit policies." Norberto Santana Jr. and Tony Saavedra, *Text messages comment on gun activists; Sheriff's officials secretly disparaged speakers at a meeting on permits*, Orange Co. Register, Feb. 3, 2009, at A1. Even more importantly, one county supervisor concluded that "the texts gave credence to accusations that sheriff's officials increased security at the next meeting to stifle opposition" to Sheriff Sandra Hutchens' concealed weapons policies. *Id.*

Similarly, Detroit mayor Kwame Kilpatrick resigned and pleaded guilty to obstruction of justice after the Detroit Free Press obtained text messages revealing that he had lied under oath. Jim Schaefer and M.L. Elrick, *Kilpatrick, chief of staff lied under oath, text messages show*, the Detroit Free Press, Jan. 24, 2008, at 1A. Kilpatrick and an aide "had given testimony in court and in a deposition denying that they had a sexual relationship or that they fired two police officers who they feared might expose their affair. But sexually explicit text messages between them, sent on city-issued pagers, contradicted that testimony...." Nick Bunkley, *Aide to Former Detroit Mayor Pleads Guilty in Sex Scandal*, N.Y. Times, Dec. 2, 2008, at A26.

A tragic reminder of the need to scrutinize texting behavior during working hours occurred recently, when a Metrolink engineer crashed the train he was operating, killing 25 people. Brief at 57 n.6. The public release of text messages sent by the engineer, which were presented as evidence in a National Transportation Safety Board hearing regarding the collision, revealed that the engineer "not only allowed unauthorized rail enthusiasts to sometimes ride in his cab, but on at least one occasion let a teen take the controls." Robert J. Lopez and Rich Connell, *Metrolink engineer let teen take throttle*, L.A. Times, Mar. 4, 2009, at A1. Sadly, the documents revealed that the engineer sent a text message only 22 seconds before the crash and a total of 57 messages on the day of the crash – strong evidence that his attention was not focused on the safety of his train.[11] Indeed, this disclosure led the state to take important safety measures: the day after federal investigators confirmed that the engineer had been sending and receiving text messages just before the crash, state regulators "voted unanimously to bypass normal procedures and impose an immediate ban on the use of wireless devices by train engineers, conductors and brakemen while on duty." Rich Connell and Robert J. Lopez, *Cellphones banned for train crews*, L.A. Times, Sep. 19, 2008, at B8.

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[11] *See* Robert J. Lopez, Rich Connell and Steve Hymon, *Train engineer sent text messages just before crash*, L.A. Times, Oct. 2, 2008, available at http://articles.latimes.com /2008/oct/02/ local/me-crash2.

It does not require much imagination to come up with a variety of other situations where the disclosure of electronic communications by government employees would serve an important public interest, and where the Ninth Circuit's decision would imperil the public's ability to scrutinize the conduct of such employees:

- A high school teacher exchanges messages on a school-issued pager with a student, revealing inappropriate communications between the teacher and the student. Acting on an anonymous tip, the local newspaper seeks access to the text messages but the school refuses, arguing that the teacher has a privacy interest in the messages that precludes the school's review.

- A citizen claims that a police officer made inappropriate demands during a routine stop and seeks access to the officer's pager messages surrounding the incident. The police department refuses, explaining that officers were informally promised privacy in their text messages and the police department is precluded from reviewing or producing those communications.

- The driver of a public bus is accused of harassing and abusive behavior towards riders, and often can be seen texting messages following such incidents. One rider requests access to all of the driver's text messages sent during business hours. The city rejects the request, claiming that

the rider has no interest sufficient to overcome the driver's privacy interest in the communications.

- A city council decides to begin treating their email communications during business hours, using city equipment, as private. A local activist seeks access to one councilmember's email communications with a real estate developer for whom the councilmember has begun advocating. The city denies the request, relying on its recently-adopted policy.

In short, the Ninth Circuit's decision potentially stymies the public's right of access to valuable information about its government in the digital age.

B. *The Societal Interest In Monitoring Police Officers' Electronic Messages Is Particularly Strong.*

The preceding section shows that there are significant public policy interests in monitoring the text messages of all governmental employees. But these general principles have even greater force with respect to police officers. "Law enforcement officers carry upon their shoulders the cloak of authority to enforce the laws of the state. In order to maintain trust in its police department, the public must be kept fully informed of the activities of its peace officers." *New York Times*, 52 Cal. App. 4th at 104-105.

Indeed, law enforcement officers "hold one of the most important positions in our society." *City of Hemet v. Superior Court*, 37 Cal. App. 4th 1411, 1428 (1995). Because "[p]olice officers are public servants sworn to serve and protect the general public," and because the "[p]erformance of police duties ... is a matter of great public importance," courts repeatedly have affirmed the manifest public interest in information about law enforcement activities. *Wiggins v. Burge*, 173 F.R.D. 226, 229 (N.D. Ill. 1997). As one court explained, "[i]t is indisputable that law enforcement is a primary function of local government and that the public has a ... great[] interest in the qualifications and conduct of law enforcement officers, even at, and perhaps especially at, an 'on the street' level." *Gomes v. Fried*, 136 Cal. App. 3d 924, 933 (1982).

Sergeant Quon had an important role in the Ontario Police Department, as a commander on the elite SWAT force. His job carried tremendous responsibility, as he addressed life-and-death situations in some of the most challenging operations in Ontario.[12] The public has a profound

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[12] The City describes the vital role of its SWAT team on its website:

> The SWAT Team consists of a predetermined number of specially selected sworn personnel, who receive continuous specialized training. They are brought together primarily for the purpose of implementing the use of their tactics and equipment in certain high-risk situations. The primary goal of SWAT is a reduction in risk and protection of life and property.

interest in knowing if this function is being properly performed when one of the City's employees sends *eighty* text messages in a single day – *ten every hour* on average. J.A. 143. This is not the occasional text message to exchange a grocery list, which would have been authorized by the City's written policy. Sergeant Quon was spending a substantial amount of time while on the job exchanging personal emails with his wife and two co-workers, one of them his mistress. Both the public and the City have a legitimate interest in evaluating whether this kind of activity interferes with an officer's job performance.

As the California Supreme Court recently recognized, one reason for public access under the CPRA is "to expose corruption, incompetence, inefficiency, prejudice, and favoritism." *International Federation of Prof. & Tech. Eng., Local 21 v. Superior Court*, 42 Cal. 4th 319, 333 (2007)

> SWAT is called upon to handle situations such as an armed or barricaded suspect, with or without hostages. These persons pose the potential of extreme risk to the lives and safety of officers and citizens when they refuse to submit to arrest. SWAT is utilized to execute high-risk search and arrest warrants, and provide executive protection.
>
> SWAT is supplemented by a Hostage Negotiations Team. SWAT relies heavily on the professional negotiations expertise and strong working relationship provided by the Hostage Negotiations Team.

See SWAT, Special Weapons and Tactics Team, City of Ontario Police Department, available at http://www.ci.ontario.ca.us/index.cfm/2969.

(citation, internal quotes omitted). Of course, some records reflecting police activities are exempt from disclosure under the CPRA. For example, Government Code § 6254(f) expressly exempts law enforcement investigatory records. *See Williams*, 5 Cal. 4th at 354. Yet, even if particular records might be reviewed and found to be exempt from disclosure under the CPRA, Sergeant Quon could not have had any *reasonable* expectation that they would not be reviewed in the first instance. Without question, the public policies that support disclosure gave his employer the unencumbered right to review his messages and determine for itself if they reflected inappropriate or wasteful behavior by Sergeant Quon.

Moreover, the nature of Sergeant Quon's messages further undermined any reason to believe they would be private. During business hours, using a pager supplied by the public's money, Sergeant Quon exchanged sexually explicit emails with two different co-workers, one of whom was his mistress. Pet. App. 54; S.E.R. 532, 539, 546, 551-553. Certainly, the City as employer has a strong interest in preventing sexual harassment, and affairs in the work environment can give rise to or provide evidence for sexual harassment claims in an unexpected array of circumstances. *E.g.*, *Miller v. Department of Corrections*, 36 Cal. 4th 446 (2005) (employees who did *not* have an affair with supervisory employee stated sexual harassment claim based on apparent *quid pro quo* between supervisory employee and other employees with whom he had affairs); *Bihun v. AT&T Information Systems, Inc.*, 13 Cal. App. 4th 976, 988 (1993)

(evidence of affair between alleged harasser and a subordinate employee was properly admitted in sexual harassment claim by a different employee), *overruled in part on other grounds by Lakin v. Watkins Associated Industries*, 6 Cal. 4th 644 (1993); *Blakey v. Continental Airlines, Inc.*, 751 A.2d 538, 552 (N.J. 2000) (employer has obligation to prevent harassing behavior within the workplace); *see generally* Charles J. Muhl, *Workplace e-mail and Internet use: employees and employers beware*, Monthly Labor Review, Feb. 2003 at 36 (discussing employers' potential legal liability for employees' inappropriate use of e-mail system and Internet).[13]

Beyond that, the public has a profound interest in evaluating actions that may give rise to liability against the City, and records detailing such acts are disclosable under the CPRA. In *Poway Unified School District v. Superior Court*, 62 Cal. App. 4th 1496 (1998), for example, a California court ordered disclosure of claims forms submitted to the government which detailed a hazing incident in which a fifteen-year-old was "brutally sodomized" with a broomstick. In *Copley Press, Inc. v. Superior Court*, 63 Cal. App. 4th 367 (1998), the court then

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[13] *See also American Soc'y of Mech. Eng'rs v. Hydrolevel Corp.*, 456 U.S. 556, 568 (1982) ("[i]n a wide variety of areas, the federal courts ... have imposed liability upon principals for the misdeeds of agents acting with apparent authority"); *Investors Group v. Avaya, Inc.*, 564 F.3d 242, 252 (3d Cir. 2009) ("[a] corporation is liable for statements by employees who have apparent authority to make them") (citations omitted); *Manale v. City of New Orleans, Dept. of Police*, 673 F.2d 122, 126 (5th Cir. 1982) ("where an employee makes a slanderous statement within the course and scope of his employment, the employer is solidarily liable").

reversed an order sealing the court records relating to the settlement of the same minor's claim. The court explained that "the public has a legitimate interest in knowing how public funds are spent and how claims (formal or informal) against public entities are settled." *Id.* at 376 (citing *Register Div. of Freedom Newspapers*, 158 Cal. App. 3d at 909).

The California Supreme Court recently reiterated the public's strong interest in understanding how public funds are spent. In an opinion that was unanimous on the main issue presented, the Court held that the CPRA requires disclosure of individually-identifiable public salary information because it furthers the public's strong interest in overseeing use of public funds. *International Federation*, 42 Cal. 4th at 333 ("[c]ounterbalancing any cognizable interest that public employees may have in avoiding disclosure of their salaries is the strong public interest in knowing how the government spends its money"); *see also New York Times Co. v. Superior Court*, 218 Cal. App. 3d 1579, 1585-1586 (1990) (disclosure of users of excess water resources ensures individuals do not receive special privileges or, alternatively, are not subject to discriminatory treatment).

Here, Sergeant Quon was being paid by the City for the time he spent sending these messages – 40,000 characters in a single month. One of the City's employees, Lieutenant Duke, spent an inordinate amount of time policing the use by Sergeant Quon and others of their pagers, and their reimbursement of overage charges to the City. S.E.R. 261; J.A. 61. Given the frequency of the text

messages, the City had a strong interest in ensuring that Sergeant Quon's personal interactions during work hours were appropriate and would not expose the City to liability. So too, the public had a strong interest in ensuring that the City's resources were spent appropriately, and that the City was not unnecessarily exposed to liability through the inappropriate conduct of one of its employees. Given all of these considerations, there can be no question that Sergeant Quon did not have a *reasonable* expectation of privacy in the content of these communications.

CONCLUSION

The government's obligations to the public it serves transcend any privacy interest that might exist in communications sent on government time, using government equipment, which reveal inefficient, inappropriate and potentially abusive behavior by a government employee. At a minimum, Sergeant Quon had no *reasonable* expectation that his employer would not review his text messages, so their review cannot give rise to a Fourth Amendment claim.

For the foregoing reasons, *Amici Curiae* respectfully urge the Court to reverse the decision of the Ninth Circuit and to reinstate the decisions in the trial court in favor of petitioners.

Respectfully submitted,

February 11, 2010

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AMICUS CURIAE BRIEF

(11)

No. 08-1332

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IN THE

Supreme Court of the United States

CITY OF ONTARIO, ONTARIO POLICE DEPARTMENT, AND LLOYD SCHARF,
Petitioners,

v.

JEFF QUON, JERILYN QUON, APRIL FLORIO, AND STEVE TRUJILLO,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE NATIONAL LEAGUE OF CITIES, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, U.S. CONFERENCE OF MAYORS, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a police department's review of text messages sent to and from a government-issued pager subject to an express no-privacy policy was consistent with the Fourth Amendment because (1) the review did not violate a reasonable expectation of privacy, and (2) the review was a reasonable employment-related search.

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INTEREST OF *AMICI CURIAE*

Amici are national organizations of city and county governments and their members throughout the United States.[1] As employers of millions of workers engaged in a wide range of government functions, they have a very strong interest in preserving their ability, as managers, to promulgate and enforce reasonable and necessary workplace rules such as the City of Ontario's no-privacy policy for computers, e-mail, and other electronic devices. As modes of electronic communication proliferate, the need for such policies will become commensurately greater.

Two Terms ago, this Court reaffirmed as a foundational principle of public employment law that "[t]he government's interest in achieving its goals as effectively and efficiently as possible" is "a significant one when it acts as employer." *Engquist v. Or. Dep't of Agric.*, 128 S. Ct. 2146, 2151 (2008). This principle is all the more compelling when, as in this case, the government function is law enforcement. Although Respondent Jeff Quon did not lose all of the protections of the Fourth Amendment when he became a SWAT officer in the Ontario Police Department, his privacy interest in personal text

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[1] The parties have consented to the filing of this amicus brief and their consents have been filed with the Clerk. This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than *amici*, their members, or their counsel has made a monetary contribution to the preparation or submission of this brief.

messages sent to and from his Department-issued pager pales in comparison to the City's need to reasonably regulate personal use of SWAT team pagers in order to provide effective law enforcement.

Unless reversed, the judgment of the court of appeals in Respondents' favor seriously threatens the effective and efficient management of municipal services and municipal workforces. *Amici* accordingly submit this brief to assist the Court in its resolution of this case.

SUMMARY OF THE ARGUMENT

The Ontario Police Department's review of text messages sent to and from Respondent Jeff Quon's Department-issued SWAT team pager did not violate Respondents' Fourth Amendment rights. Respondents had no reasonable expectation of privacy in those messages because the Department had an explicit policy in place providing that messages sent through Department-issued communications devices were subject to inspection, and because the messages were subject to public disclosure under state law. Moreover, even if Respondents had a reasonable expectation of privacy in the text messages, the Department's review of those messages was a reasonable employment-related search justified by the City's interests in maintaining efficiency and protecting public safety.

1. a. Respondents did not have a reasonable expectation that their text messages would remain private. A public employee's expectation of privacy in information sent to and from a work-issued pager cannot be reasonable where the employer has notified users through an official policy that those

communications are subject to inspection by the employer.

The Department's policy made clear that employees should not use their work equipment for personal business, and it notified them that their computers and pagers were subject to inspection at any time without notice. These were the "operational realities" of the workplace. *O'Connor v. Ortega*, 480 U.S. 709, 717 (1987); *Engquist*, 128 S. Ct. at 2151. That a Lieutenant charged with monitoring pager use chose not to exercise the discretion afforded to him under the Department's policies does not make Respondents' subjective expectation that their messages would *never* be inspected by anyone an expectation that society is prepared to recognize as reasonable.

b. Respondents had no reasonable expectation of privacy in the records of their work-related communications because those communications are public records subject to disclosure under state law. The messages thus are similar to other objects and information that this Court has held are not subject to Fourth Amendment protection, such as trash left on the curb, information about an individual's movement through public places, and conversations in front of strangers. When an individual exposes an object or information to the public, his expectation that it will remain private is unreasonable.

The court of appeals' conclusion that Respondents had a reasonable expectation of privacy in personal text messages sent to and from Respondent Quon's pager because it was unlikely that any member of the public would actually request those messages is incorrect. It is the public's access to information, not

the frequency of such access, that determines whether an individual's subjective expectation of privacy is one that society is prepared to recognize as reasonable.

2. a. Even if Respondents had a reasonable expectation of privacy in their text messages, the Department's review of the messages was a reasonable employment-related search. This Court has long recognized that the efficient operation of the workplace and protection of public safety are overriding government interests. *See, e.g.*, *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 677 (1989); *Engquist*, 128 S. Ct. at 2151. The Department issued pagers to its SWAT team members to facilitate rapid communication during SWAT operations, and it has a strong public safety interest in making sure that its officers will not be distracted with personal messages being delivered to those pagers during an emergency. Because Respondent Quon's misuse of his SWAT pager could have serious public safety consequences during a SWAT operation, the limited intrusion of reviewing messages sent to and from the pager was a reasonable employment-related search.

b. A public employer's workplace decisions need not be the "least restrictive means" to be reasonable under the Fourth Amendment. An employment-related search passes constitutional muster if it is reasonable at the outset and reasonable in scope. *Ortega*, 480 U.S. at 726. The court of appeals concluded that the Department's review of Respondents' text messages was unreasonable in scope because there were less intrusive means through which the Department could have obtained

the information it sought. This Court's precedents on "special needs" searches under the Fourth Amendment preclude the Ninth Circuit's least restrictive means analysis.

ARGUMENT

I. THERE IS NO REASONABLE EXPECTATION OF PRIVACY IN MESSAGES SENT TO OR FROM A GOVERNMENT-ISSUED PAGER SUBJECT TO AN EXPRESS NO-PRIVACY POLICY AND TO PUBLIC INSPECTION.

"[A] Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable." *Kyllo v. United States*, 533 U.S. 27, 33 (2001) (citing *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)). Absent a justified expectation of privacy, there can be no "search" for purposes of the Fourth Amendment. *See id.*

In this case, Respondents had no reasonable expectation of privacy in messages sent to and from Respondent Quon's government-issued pager. The Ontario Police Department has adopted a written policy that all text messages are subject to inspection, and has specifically informed users that they have no expectation of privacy or confidentiality when using Department-issued devices. In addition, Respondents' messages are subject to public disclosure under state law.

A. There Is No Reasonable Expectation Of Privacy In Messages Sent To Or From A Government-Issued Pager When The Government Employer Has Adopted An Express No-Privacy Policy.

The Ontario Police Department has adopted a written "Computer Usage, Internet and E-mail Policy." Pet. App. 4. That policy expressly provides, among other things: (i) that the Department "reserves the right to monitor and log all network activity including e-mail and Internet use"; (ii) that users "should have no expectation of privacy and confidentiality when using these resources"; (iii) that "[a]ccess to the Internet and the e-mail system is not confidential . . . [and a]s such, these systems should not be used for personal or confidential communications"; and (iv) that e-mail messages "are also subject to 'access and disclosure' in the legal system and the media." Pet. App. 152-53. The Department convened a meeting at which officers were informed that text messages were subject to this no-privacy policy, and the Chief of Police issued a memorandum confirming that the policy was applicable. J.A. 28, 30. Respondents Quon and Trujillo both signed written acknowledgements that they were aware of the no-privacy policy. Pet. App. 156-57.

In these circumstances, Respondents had no reasonable expectation of privacy in messages sent to or from Respondent Quon's Department-issued pager. The court of appeals' holding that the Department's policy was abrogated by a non-policymaking employee destabilizes policies of all varieties at all levels of government, and poses a

threat to the efficient and effective administration of government.

In *O'Connor v. Ortega*, a plurality of this Court concluded that, in some circumstances, the "operational realities of the workplace" may eliminate a public employee's reasonable expectation of privacy from oversight by a supervisor. 480 U.S. at 717; *see also Engquist*, 128 S. Ct. at 2152 ("[A]lthough government employees do not lose their constitutional rights when they accept their positions, those rights must be balanced against the realities of the employment context."). The reasonableness of a public employee's privacy expectations must be assessed on a case-by-case basis "in the context of the employment relation." *Ortega*, 480 U.S. at 717-18; *see also Engquist*, 128 S. Ct. at 2151-52 (articulating framework for analyzing public employees' constitutional claims).

"Public employees . . . often occupy trusted positions in society." *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006). In the law enforcement context, "[a] trustworthy police force is a precondition of minimal social stability . . . ." *Biehunik v. Felicetta*, 441 F.2d 228, 230 (2d Cir. 1971). Because the police "carry upon their shoulders the cloak of authority to enforce the laws of the state," *Comm'n on Peace Officer Standards & Training v. Superior Court*, 165 P.3d 462, 473 (Cal. 2007) (internal quotation marks omitted), abuses within a police department have great potential for social harm, *Coursey v. Greater Niles Twp. Publ'g Corp.*, 239 N.E.2d 837, 841 (Ill. 1968).

In this case, the operational realities of the Ontario Police Department demonstrate that SWAT

team members have no reasonable expectation of privacy in electronic communications on their Department-issued pagers. The Department distributed the pagers for the purpose of facilitating logistical communications among SWAT team officers. Pet. App. 45-46. The Department has an obvious interest in monitoring such communications to ensure the efficient and effective operation of a police unit that deals with high-stakes emergencies involving public safety and the safety of its officers.

The Department's express no-privacy policy eliminates any reasonable expectation of privacy in messages sent to and from Department-issued pagers. In similar circumstances, courts have recognized that a public employer's no-privacy policy prevents any reasonable expectation of privacy from attaching to electronic communications in the workplace. *See, e.g.*, *United States v. Thorn*, 375 F.3d 679, 683 (8th Cir. 2004) (no reasonable expectation of privacy in employee's computer when employee signed policy prohibiting its unauthorized use, providing for government audits, and disclaiming any privacy rights), *vacated on other grounds*, 543 U.S. 1112 (2005); *United States v. Angevine*, 281 F.3d 1130, 1134 (10th Cir. 2002) (no reasonable expectation of privacy in data downloaded to a public university professor's computer due to a policy warning that computer usage was subject to audit and disclaiming confidentiality in its use); *United States v. Simons*, 206 F.3d 392, 398-99 (4th Cir. 2000) (no reasonable expectation of privacy in Internet use because Federal Government had policy prohibiting Internet use for non-government activities and allowing for usage audits); *cf. Ortega*,

480 U.S. at 719 (noting that employer did not have a policy discouraging office storage of personal items); *Leventhal v. Knapek*, 266 F.3d 64, 73-74 (2d Cir. 2001) (Sotomayor, J.) (finding a reasonable expectation of privacy in an office computer that was exclusively controlled by an employee, in part because there was no policy disclaiming any such privacy expectations).[2]

The court of appeals correctly recognized that, based on the Police Department's written policy governing use of its Department-issued communications devices, it was unreasonable for Respondent Quon to expect any level of privacy in communications conducted using that equipment. Pet. App. 29. But the court of appeals nevertheless determined that Respondent Quon had a legitimate expectation of privacy because Lieutenant Duke, a non-policymaking employee who was charged with monitoring pager use, had an "informal policy" that text messages would not be audited if the officer paid the additional costs that the Department incurred when the officer exceeded the monthly allotment of 25,000 characters. *Id.*

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[2] Courts have reached similar conclusions in cases involving private employers. *See, e.g., Muick v. Glenayre Elecs.*, 280 F.3d 741, 743 (7th Cir. 2002) (no reasonable expectation of privacy because of policy providing for employer inspection of employer-issued laptops); *Miller v. Blattner*, __ F. Supp. 2d __, No. 08-3788, 2009 WL 4929036, at *9 (E.D. La. Dec. 14, 2009) (citation not yet available) (dismissing claim for invasion of privacy against private employer because employer policy stated that all e-mails on the employer's computers were employer's property).

This holding threatens to undermine the enforceability of policies that are critical to the effective and efficient management of law enforcement agencies, as well as other government agencies. It is also incorrect. Respondents could have no reasonable expectation that Lieutenant Duke's informal practice of allowing officers to pay the overage if they exceeded the monthly character limit prevented *any* Department official – including the Chief of Police – from ordering a review of their text messages for *any* purpose, including an assessment of whether the Department should increase its monthly character limit.

In short, the "operational realities" of the Ontario Police Department made it unreasonable for Respondents to have any expectation of privacy in communications sent or received on Department-issued pagers.

B. There Is No Reasonable Expectation Of Privacy In Electronic Communications That Are Available For Public Inspection.

To maintain its trust in the police, "the public must be kept fully informed of the activities of its peace officers." *Comm'n on Peace Officer Standards & Training*, 165 P.3d at 473; *see also Waller v. Georgia*, 467 U.S. 39, 47 (1984) (citation and internal quotation marks omitted) (noting that there is a "strong interest in exposing . . . police misconduct to the salutary effects of public scrutiny"). California provides citizens with broad access to public records, including police department records, under the California Public Records Act ("CPRA"), Cal. Gov't Code §§ 6250 *et seq.* Under California law, such

access to public records is "a fundamental and necessary right of every person." Cal. Gov't Code § 6250; *see also* Cal. Const. art. I, § 3(b)(1) ("Sunshine Amendment"). Because communications to and from a Department-issued pager are public records subject to disclosure under the CPRA, *see* Pet. Br. 35-40, Respondents can have no reasonable expectation of privacy in such communications.

1. There Is No Reasonable Expectation Of Privacy In Communications Subject To Public View.

"What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz*, 389 U.S. at 351. In *California v. Greenwood*, for example, the Court held that there was no reasonable expectation of privacy in the contents of opaque trash bags left at the curb, an "area particularly suited for public inspection." 486 U.S. 35, 40-41 (1988) (citation and internal quotation marks omitted). Similarly, in *United States v. Knotts*, the Court found that an individual had no reasonable expectation of privacy in his public movements because he "voluntarily conveyed to anyone who wanted to look the fact that he was traveling over particular roads in a particular direction." 460 U.S. 276, 281-82 (1983).

This "public inspection" principle is fully applicable to written or oral statements. As Justice Harlan said in *Katz*, "conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable." 389 U.S. at 361 (Harlan, J., concurring). In *Hoffa v. United States*, the Court held that the Fourth Amendment did not apply to

statements voluntarily made to an individual who, unbeknownst to the speaker, was a government informant. 385 U.S. 293, 303 (1966) (citing *Lopez v. United States*, 373 U.S. 427, 465 (1963) (Brennan, J., dissenting)); *see also United States v. Fisch*, 474 F.2d 1071, 1077-78 (9th Cir. 1973) (finding no reasonable expectation of privacy in comments made in a hotel room that were audible to the unaided ear in the adjoining room).

Tort law provides further support for the proposition that there is no reasonable expectation of privacy in information available for public inspection. In examining the tort of invasion of privacy, this Court has noted that "the interests of privacy fade when the information involved already appears on the public record." *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 494-95 (1975). Consequently, "'there is no liability for the examination of a public record . . . or of documents . . . requir[ed] to [be] available for public inspection.'" *Id.* at 494 (quoting Restatement (Second) of Torts § 652B cmt. c (Tentative Draft No. 13, 1967)).

Because the communications at issue in this case are subject to disclosure upon request by any member of the public, Respondents lack a reasonable expectation that their communications will remain private.

2. The Likelihood That The Public Will Request A Given Public Record Is Not Relevant To Fourth Amendment Analysis.

The court of appeals held that Respondents had a reasonable expectation of privacy in their text

messages despite the CPRA because "'[t]here is no evidence . . . suggesting that CPRA requests are. . . widespread or frequent.'" Pet. App. 32 (quoting dist. ct. op.). This analysis is flawed. In holding that public exposure destroys a reasonable expectation of privacy, this Court has not inquired into the likelihood that exposure will lead to discovery. In *Greenwood*, *Knotts*, and *Hoffa*, the Court did not consider the probability that someone would search a bag of garbage left at the curb, follow a person's movements, or report a conversation to the authorities. *See Greenwood*, 486 U.S. at 40-41; *Knotts*, 460 U.S. at 281-82; *Hoffa*, 385 U.S. at 303. Instead, exposure to the public is sufficient to defeat a reasonable expectation of privacy in these events.

Similarly, in *California v. Ciraolo*, the defendant was growing marijuana in his backyard, around which he had erected two tall fences. 476 U.S. 207, 209 (1986). He did nothing to protect the plants from aerial view, and police observed the yard from an airplane flying over the property. *Id.* The Court analogized the airways to "public thoroughfares" and determined that police officers were not required "to shield their eyes" from seeing what was readily visible from such places. *Id.* at 213.

Three years later, in *Florida v. Riley*, the Court addressed whether there was a reasonable expectation of privacy in a partially covered backyard greenhouse that contained marijuana plants. 488 U.S. 445 (1989). The Court followed *Ciraolo* and held that there was no such expectation because the plants were readily visible from a place where the public could legally be – a helicopter flying in the airspace above the greenhouse. *Id.* at 449-52.

See William Shepard McAninch, *Unreasonable Expectation: The Supreme Court and the Fourth Amendment*, 20 Stetson L. Rev. 435, 454 (1991) ("*Riley* tells the officer that so long as he is in a place where he has a legal right to be, no matter how unlikely it is that anyone might be there, his observations from that vantage point do not implicate fourth amendment interests . . . .").[3]

In *Kyllo*, the Court held that the Fourth Amendment protects an individual's privacy interest in infrared radiation emitted from a home. 533 U.S. at 40. The Court noted that the infrared emissions are visible only with a thermal imaging device that is "not in general public use." *Id.* at 34. In contrast to a thermal imaging device, the CPRA is available for

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[3] Justice O'Connor's concurring opinion in *Riley* suggests that the frequency with which members of the public enter an area is relevant to whether an expectation of privacy is reasonable. *See* 488 U.S. at 454 (O'Connor, J., concurring in the judgment) ("[W]e must ask whether the helicopter was in the public airways at an altitude at which members of the public travel with *sufficient regularity* that Riley's expectation of privacy from aerial observation was not one that society is prepared to recognize as reasonable." (emphasis added) (internal citation and quotation marks omitted)). Justice O'Connor made clear, however, that any such inquiry is general: "[I]f the public can *generally be expected* to travel over residential backyards at an altitude of 400 feet, Riley cannot reasonably expect his curtilage to be free from such aerial observation." *Id.* at 455 (O'Connor, J., concurring in the judgment) (emphasis added). Under this standard, requests under public records laws are sufficiently common to preclude any reasonable expectation of privacy in information subject to those requests. *See, e.g.*, Federal Bureau of Investigation, Record/Information/Dissemination Section (RIDS), *at* http://foia.fbi.gov/rids.htm (estimating that the FBI receives 13,200 requests for information under the Freedom of Information and Privacy Acts each year and currently employs roughly 300 people whose job it is to respond to these requests).

all members of the public and is widely used to obtain government records.

In sum, it is the public's access to information, not the frequency of such access, that informs the reasonableness inquiry. *See* Manish Kumar, Note, *Constitutionalizing E-Mail Privacy by Informational Access*, 9 Minn. J. L. Sci. & Tech. 257, 269-74 (2008). Applied to electronic communications, the reasonableness of privacy expectations "turns on whether the public has general access to the electronic information." *Id.* at 274. Under this standard, Respondents have no reasonable expectation of privacy in communications to and from a Department-issued pager.

II. A POLICE DEPARTMENT'S REVIEW OF TEXT MESSAGES SENT TO OR FROM A GOVERNMENT-ISSUED PAGER IS REASONABLE.

Even if Respondents could somehow establish that they had a reasonable expectation of privacy in text messages sent to and from Respondent Quon's pager, their Fourth Amendment claim would fail because the Department's review of the text messages was reasonable. This Court's precedents recognize that public employers have substantial latitude to manage their offices and employees, consistent with the strong government interest in the efficient and effective administration of public agencies. When managing public safety officers, state and local government employers can take reasonable actions designed to administer law enforcement agencies efficiently and effectively, without micromanagement by federal courts erroneously using a "least restrictive means" test.

A. The Police Department's Substantial Interests In Public Safety And Efficient Management Outweigh Respondents' Limited Privacy Interests.

This Court has long recognized that "government offices could not function if every employment decision became a constitutional matter." *Connick v. Myers*, 461 U.S. 138, 143 (1983); *see also Ortega*, 480 U.S. at 722 ("[R]equiring a warrant whenever the employer wished to enter an employee's office, desk, or file cabinets for a work-related purpose would seriously disrupt the routine conduct of business and would be unduly burdensome."). Consequently, "[g]overnment employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services." *Garcetti*, 547 U.S. at 418.

The Court has stated repeatedly that a state or local government employer "has significantly greater leeway in its dealings with citizen employees than it does when it brings its sovereign power to bear on citizens at large." *Engquist*, 128 S. Ct. at 2151; *see also Garcetti*, 547 U.S. at 418 ("When a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom."); *Waters v. Churchill*, 511 U.S. 661, 671 (1994) (plurality opinion) ("[T]he government as employer indeed has far broader powers than does the government as sovereign."); *Ortega*, 480 U.S. at 732 (Scalia, J., concurring) (employment-related searches do not violate Fourth Amendment if they are "of the sort that are regarded as reasonable and normal in the private-employer context").

In analyzing Fourth Amendment claims by public employees, the Court has weighed the "privacy interests of government employees in their place of work" against "the substantial government interest in the efficient and proper operation of the workplace." *Ortega*, 480 U.S. at 725; *see also Engquist*, 128 S. Ct. at 2152. That analysis leads to the conclusion that the Police Department's actions in this case were reasonable.

1. Respondents' Privacy Interests Are Limited.

A public employee's privacy interests in his place of work are "far less than those found at home." *Ortega*, 480 U.S. at 725. As the *Ortega* plurality noted, "[g]overnment offices are provided to employees for the sole purpose of facilitating the work of an agency." *Id.* Consequently, "[t]he employee may avoid exposing personal belongings at work by simply leaving them at home." *Id.* In this case, Respondent Quon could have avoided an audit of his text messages simply by limiting the use of his Department-issued pager to public business and using a private cell phone or pager for private text messaging.

By 2002, private alphanumeric pagers and cell phones with text-messaging capability were commonplace. *See, e.g.*, BBC News, *The Pager Rings Off* (Jan. 26, 2001), *available at* http://news.bbc.co.uk/2/hi/uk_news/1137923.stm (reporting that by 2001, text-messaging mobile phones had rendered alphanumeric pagers obsolete). Respondent Quon's wife and girlfriend each had a personal device for text messaging. It would have been simple enough for him to "lea[ve] [his conversations] at home" by

using a personal device. *Ortega*, 480 U.S. at 725. Instead, he abused his City-owned pager by using it to send hundreds of inappropriate text messages, and then forced the City to defend this § 1983 action after his misuse led the Department to audit the pager.

Contrary to the court of appeals' view, Chief Scharf's review of the text messages was not a "[s]earch and seizure[]" of a government employee's "private property." Pet. App. 22-28. The messages were sent to and from a Department-issued pager that was paid for by the City and provided to Respondent Quon as a member of the Department's SWAT team "to enable better coordination and a more rapid and effective response to emergencies." Pet. App. 45-46. In this context, Respondents' reasonable privacy interests are limited at best, and "government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary." *Connick*, 461 U.S. at 146.

2. A Police Department Has A Substantial Interest In Monitoring Messages Sent To And From SWAT Team Members Using A Department-Issued Pager.

"[P]ublic employees are entrusted with tremendous responsibility, and the consequences of their misconduct or incompetence to both the agency and the public interest can be severe." *Ortega*, 480 U.S. at 724. This is especially true in the case of law enforcement officers. *See Garcetti*, 547 U.S. at 419 (deputy district attorney). The Court has accordingly recognized the important government interests at

stake in upholding the reasonableness of searches of public safety officers under the Fourth Amendment.

In *National Treasury Employees Union v. Von Raab*, this Court upheld suspicionless drug testing of customs officers seeking transfer or promotion to certain positions. 489 U.S. at 677. The Court determined that the government interests at stake were "compelling," noting that the public interest "demands effective measures to prevent the promotion of drug users to positions that require [them] to carry a firearm." *Id.* at 670. Because of the important public safety concerns of drug-users handling firearms and protecting the borders, this Court held that a privacy intrusion as substantial as taking a urine sample from employees was a reasonable employment-related search. *Id.* at 677.[4]

In weighing a government employee's rights against a public employer's need to manage its workforce, this Court has stated repeatedly that "[g]overnment employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services." *Garcetti*, 547 U.S. at 418;[5] *see also*

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[4] *See also Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 634 (1989) (holding that suspicionless drug testing of railroad employees involved in accidents was reasonable under the Fourth Amendment based on safety threat of alcohol and drug use); *cf. Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 661 (1995) (holding that suspicionless drug testing of student-athletes was reasonable under the Fourth Amendment based on safety risk to students participating in athletics).

[5] In *Engquist*, the Court specifically noted that "public-employee speech cases are particularly instructive" in analyzing (...continued)

Ortega, 480 U.S. at 721, 724 (the "need to complete the government agency's work in a prompt and efficient manner" is an "overriding" government interest).

Most recently, in *Engquist*, the Court noted that "[t]he government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as a sovereign to a significant one when it acts as employer." 128 S. Ct. at 2151 (citation and internal quotation marks omitted). As a result, the Court has allowed restrictions on individual freedom in government employment so long as the "basic concerns" of the Constitution are protected. *Id.* at 2152; *see also Connick*, 461 U.S. at 145-46 (preserving for public employees the First Amendment's most critical function of protecting speech on matters of public concern).

The Ontario Police Department issued pagers to its SWAT team members "to facilitate the department's goal of 'enabl[ing] better coordination and a more rapid and effective response to emergencies by providing nearly instantaneous situational awareness to the team as to the other members[] whereabouts.'" Pet App. 142. When SWAT team members use their SWAT pagers for personal messages, they put those operations at risk. Officers who are supposed to be using the pagers to coordinate SWAT operations easily could be distracted by personal messages being sent to their

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public employee claims under other constitutional provisions. 128 S. Ct. at 2152.

pagers by their wives, girlfriends, and others. Because there are strong public safety and workplace efficiency interests in avoiding such misuse of police department communications devices, the Department's review of messages sent and received on such devices, pursuant to a written policy that has been communicated to its officers, is reasonable.

B. Public Employers' Workplace Decisions Are Not Subject To A "Least Restrictive Means" Test.

Under the Fourth Amendment, the balance between individual rights and the need for efficiency in the government workplace is achieved by requiring workplace searches to be "reasonable" at their inception and in their scope. *Ortega*, 480 U.S. at 726. A search is reasonable at its inception if "there are reasonable grounds for suspecting that the search will turn up evidence that the employee is guilty of work-related misconduct, or that the search is necessary for a noninvestigatory work-related purpose." *Id.* The search is reasonable in scope "when 'the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of . . . the nature of the [misconduct].'" *Id.* (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 342 (1985)).

In this case, the court of appeals correctly concluded that the Department's decision to review Respondent Quon's text messages was reasonable at its inception as a work-related search designed to ensure that the Department's text messaging plan was appropriate for its needs. Pet. App. 34. The court further held, however, that the search was unreasonable in scope. The court reached this

conclusion by applying a "least restrictive means" test and concluding that "[t]here were a host of simpler ways to verify the efficacy of the 25,000 character limit . . . without intruding on Appellants' Fourth Amendment rights," such as giving Respondent Quon a one-month notice that it would be reviewing his text messages, or by giving Respondent Quon the opportunity to review the messages himself and redact personal messages before giving the transcripts to his superiors. Pet. App. 35-36.

This Court's precedents foreclose the court of appeals' application of a least restrictive means test in this situation. In *Skinner*, the Court concluded that "[t]he reasonableness of any particular government activity does not necessarily or invariably turn on the existence of alternative or 'less intrusive' means." 489 U.S. at 629 n.9 (internal citation and quotation marks omitted); *see also Vernonia Sch. Dist.*, 515 U.S. at 663 ("We have repeatedly refused to declare that only the 'least intrusive' search practicable can be reasonable under the Fourth Amendment."); *Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822, 837 (2002) ("[T]his Court has repeatedly stated that reasonableness under the Fourth Amendment does not require employing the least intrusive means."); *cf. Garcetti*, 547 U.S. at 423 ("[The] displacement of managerial discretion by judicial supervision finds no support in our precedents.").

* * * * *

Government employers have an overriding interest in knowing whether public employees – particularly police officers assigned to SWAT teams –

are being distracted from their official duties by personal text messages being sent to and from their employer-issued pagers. The Department's review of the messages sent to and from Respondent Quon's pager was entirely reasonable given Respondents' limited privacy interests and the City's overriding interests in public safety and efficiency.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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SUPREME COURT OF THE UNITED STATES

CITY OF ONTARIO, CALIFORNIA, ET AL.,
Petitioners,

v.

JEFF QUON, ET AL.,
Respondents.

ON WRIT OF CERTIORARI
TO TIIE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AMICI CURIAE BRIEF OF NATIONAL SCHOOL BOARDS ASSOCIATION, NATIONAL ASSOCIATION OF SECONDARY SCHOOL PRINCIPALS AND CALIFORNIA SCHOOL BOARDS ASSOCIATION IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*[1]

The National School Boards Association (NSBA), founded in 1940, is a not-for-profit organization representing state associations of school boards and their over 14,500 member districts across the United States, which serve the nation's 50 million public school students. Collectively, school districts are the largest public employer in the nation.

In existence since 1916, the National Association of Secondary School Principals (NASSP) is the preeminent organization of and national voice for middle level and high school principals, assistant principals, and aspiring school leaders from across the United States and more than 45 countries around the world. The mission of NASSP is to promote excellence in school leadership. NASSP administers the National Honor Society, National Junior Honor Society, National Elementary Honor Society and National Association of Student Councils.

The California School Boards Association (CSBA) is a California non-profit corporation. CSBA is a member-driven association composed of nearly 1,000 K-12 school district governing boards and county boards of education throughout California. CSBA supports local school board governance and

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[1] This brief is submitted with the consent of all parties. Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* certifies that no counsel for a party authored this brief in whole or in part. No person or entity, other than *amici*, their members, or their counsel made a monetary contribution for the preparation or submission of this brief.

advocates on behalf of school districts and county offices of education. As part of CSBA, the Education Legal Alliance (the "Alliance") helps to ensure that local school boards retain the authority to fully exercise the responsibilities vested in them by law to make appropriate policy and fiscal decisions for their local educational agencies. The Alliance represents its members, just under 800 of the state's 1,000 school districts and county offices of education, by addressing legal issues of statewide concern to school districts. The Alliance's activities include joining in litigation where the interests of public education are at stake.

Amici are committed to supporting and advocating on behalf of school boards and local administrators to promote safe learning environments, as well as the efficient and effective operation of school districts. At a time when technology is becoming ubiquitous in schools, *amici* strongly believe that in order to prevent employee misconduct and ultimately safeguard students, school districts must be empowered to regulate the use of workplace technologies through their officially enacted policies, despite potential imperfect implementation of these policies by non-policy making employees. School boards have a crucial interest in maintaining this discretion so that school administrators can once again rely on their officially enacted policies without fear of litigation, and turn their attention to the business of educating students.

SUMMARY OF THE ARGUMENT

The Ninth Circuit Court of Appeals' decision in *Quon v. Arch Wireless Operating Company, Inc.*, 529 F.3d 892 (9th Cir. 2008), finding a reasonable expectation of privacy in employer-issued pagers despite an official policy to the contrary, has significant repercussions for public entities in general, and school districts in particular.

While school district employees do not shed their Fourth Amendment rights merely by virtue of their public employment, it is also true that "[t]he operational realities of the workplace may make *some* employees' expectations of privacy unreasonable." *O'Connor v. Ortega*, 480 U.S. 709, 717 (1987) (plurality). The Ninth Circuit's holding that an unauthorized informal policy can create an expectation of privacy in workplace electronic communications, despite an official policy to the contrary and the public nature of the communication under public records laws, eviscerates a school district's ability not only to efficiently and effectively manage the workplace, but also to ensure the health, welfare and safety of its students. The decision imposes an unattainable standard of perfect policy enforcement, and ignores the "operational realities of the workplace." *See Quon*, 529 F.3d at 892. Under the circumstances presented here, employees should have no objectively reasonable expectation of privacy.

Even if employees do have a reasonable expectation of privacy, a school district's interests in maintaining a safe school environment, and an effective and

efficient workplace, far outweigh an employee's expectation of privacy in workplace electronic communications. Unfortunately, employee misconduct in the school context can have dire consequences. School leaders must be able to investigate inappropriate relationships between teachers and students, and other problematic behavior. U.S. Department of Education, Office of the Under Secretary, *Educator Sexual Misconduct: A Synthesis of Existing Literature*, Washington, D.C., 2004.

A byproduct of the increase in workplace technology is the attendant increased means for such inappropriate relationships to develop unnoticed. *See* Christy Oglesby, *Cells, Texting Give Predators Secret Path to Kids*, CNN, Jan. 11, 2008, available at http://www.cnn.com/2008/CRIME/01/11/teachers.charged/index.html. Absent electronic evidence, the inappropriate conduct often would not be discovered and students would continue to be harmed. School board technology use agreements, in which employees are almost universally required to acknowledge that they have no expectation of privacy in electronic communications, are vital to ensuring that schools monitor their workforce and keep students safe.

ARGUMENT

At issue is a school district's ability to fulfill its obligation to ensure the safety of its pupils by searching the electronic communication of its employees. Such searches by a school district implicate an employee's Fourth Amendment rights

only if the employee has a reasonable expectation of privacy in the subject of the search, which is one "that society is prepared to consider reasonable." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). While it is true that school district employees do not shed their Fourth Amendment rights merely by virtue of their public employment, it is also true that "[t]he operational realities of the workplace may make *some* employees' expectations of privacy unreasonable."[2] *O'Connor*, 480 U.S. at 717.

This Court long ago recognized, and has since reaffirmed, that searches by public employers for work-related, non-investigative purposes or to investigate workplace violations implicate "special needs" that warrant a "reasonableness under all the circumstances" standard, rather than the typical warrant and probable cause requirement. *O'Connor*, 480 U.S. at 725; *accord id.* at 732 (Scalia, J., concurring in the judgment); *see Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652-53 (1995); *New Jersey v. T.L.O.* 469 U.S. 325, 341 (1985). These "special needs" are nowhere more apparent than in the school context, where, unfortunately, inappropriate contact between an employee and student is often effectuated through the use of technology, particularly e-mails and text messages.

Since *O'Connor* established a framework for analyzing the reasonableness of public employer

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[2] See *O'Connor*, 480 U.S. at 718 (finding employee had a reasonable expectation of privacy in office desk and file cabinets which employee did not share, and employee occupied the office for 17 years, kept personal documents in the office, and training files were kept outside the office).

searches, school boards have been careful to adopt policies that make clear that employees have no expectation of privacy in the content of their electronic communications, often explicitly requiring employees to consent to searches of such content.[3] A rule, like the one established by the Ninth Circuit in this case, that an unauthorized informal policy can create an expectation of privacy, despite a school board-approved official policy to the contrary, eviscerates a school district's ability not only to efficiently and effectively manage the workplace, but also to ensure the health, welfare and safety of its students. It requires an unattainable standard of perfect policy enforcement, which ignores the "operational realities of the workplace." *See Quon*, 529 F.3d at 904-05.

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[3] *See, e.g.*, California School Boards Association Sample Board Policy & Administrative Regulation 4040, Employee Use of Technology, Personnel, available at http://www.gamutonline.net/DisplayPolicy/244945/4; Colorado Sample Board Policy, Electronic Communication, available at http://nepnpolicies.nsba.org/viewHit.php; Connecticut Association of Boards of Education Sample Board Policy, Electronic Mail, available at http://nepnpolicies.nsba.org/viewHit.php.

I. SCHOOL DISTRICT POLICIES PROVIDING ACCESS TO EMPLOYEE ELECTRONIC COMMUNICATIONS, AS WELL AS THE PUBLIC NATURE OF SUCH COMMUNICATIONS, REMOVE ANY EXPECTATION OF PRIVACY DESPITE ERRANT ENFORCEMENT OR INTERPRETATION BY SUPERVISORS.

A. Technology use policies and agreements, often incorporating employee consent to monitor and search electronic communications, are so widespread that it is unreasonable to find an expectation of privacy in electronic communications where such policies are in place.

The operational reality of the modern workplace includes the proliferation of the use of technology, which has dramatically transformed the workplace. Amanda J. Lavis, Note, *Employers Cannot Get the Message: Text Messaging and Employee Privacy*, 54 Vill. L. Rev. 513, 518 (2009) ("E-mail, the internet, cell phones, and text messages have all revolutionized communications in the new digital workplace."). Text messaging, in particular, has become "a major means of communication around the world and a tool utilized by many businesses."[4] Lavis, *supra*, at 514-16. This technological transformation is equally, if not more, dramatic for school districts. Pedagogical forces often drive

[4] In 2007, 189 billion text messages were sent in the United States. Lavis, *supra*, at 515.

schools to strive to integrate new technologies with conventional teaching methods and school administration, making these technologies both ubiquitous and readily available to both employees and students.[5]

Attendant to this technological proliferation is the widespread adoption of technology use policies, often called "acceptable use" policies. These policies, recognizing that use of these technologies by employees will be prolific and is essential to accomplishing their educational goals, reasonably limit use to work-related purposes. School employees frequently are given copies of the policy and sign forms granting explicit consent for the district to examine all their electronic communications at will. These policies make it patently unreasonable to find an expectation of privacy in such communications.

In the private sector, where constitutional concerns do not apply, monitoring of employee e-mails and internet usage is common for similar reasons—to

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[5] Chris Dede, *Emerging Influences of Information Technology on School Curriculum*, 32 J. Curriculum Stud. 281 (2000) ("In developed countries, sophisticated computers and telecommunications are on the verge of reshaping the mission, objectives, content and processes of schooling. . . . In response, all forms of societal institutions are altering slowly, but radically—even schools. Since one of education's goals is to prepare students for work and citizenship, schools are attempting to change their policies, practices, and curriculum to meet the challenge of making pupils ready for a future quite different than the immediate past.") (citations omitted); *see also* Howard D. Mehlinger, *School Reform in the Information Age*, Phi Delta Kappan, Feb. 1996, at 400-07.

ensure employees are using their employer's time and resources for work-related purposes. A recent survey conducted by the American Management Association in conjunction with the ePolicy Institute found that of the 304 companies that participated, 66% monitor internet usage and 43% monitor e-mail. Am. Mgmt. Ass'n & ePol'y Inst., 2007 Electronic Monitoring & Surveillance Survey (2007), available at http://www.amanet.org/training/seminars/2007-Electronic-Monitoring-and-Surveillance-Survey-41.aspx. Of the companies that monitor employee technology use, 83% inform employees that the company is monitoring content, keystrokes, and time at the keyboard, 84% inform them that the company reviews computer files, and 71% are notified of e-mail monitoring. *Id.*

These survey results support the fact that, in the face of acceptable use policies and agreements, neither society, nor employees themselves, find an expectation of privacy in workplace electronic communications reasonable.[6] The lack of an expectation of privacy under these circumstances is amplified in the public sector where it is well established that a citizen entering government service "must accept certain limitations on his or her freedom." *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006).

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[6] See Lavis, *supra*, at 513, 538-39; *Id.* at 526, n. 66 (citing Paul M. Schwartz, *Beyond Lessig's Code for Internet Privacy: Cyberspace Filters, Privacy-Control, and Fair Informational Practices*, 2000 Wis. L. Rev. 743, 770 (2000) ("Most participants in the American workplace leave their informational privacy at the door of work."); Larry Armstrong, *Someone to Watch Over You*, Bus. Week, July 10, 2000, at 189 ("When it comes to privacy in the workplace, you don't have any.").

Even more compelling is the fact that school district acceptable use policies often require the employee to agree explicitly that they have no expectation of privacy in workplace electronic communications, and consent to monitoring and searches of such communication. It is anomalous that under the general warrant and probable cause standard applied in non-special needs contexts, consent destroys a Fourth Amendment claim, yet under the Ninth Circuit's application of the less exacting reasonableness standard, an employee can establish a Fourth Amendment violation even though he or she has already acknowledged no expectation of privacy in the communications and consented to monitoring.[7] *See Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973) (it is "well settled that one of

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[7] Here, the employees whose pager messages were seized signed an "Employee Acknowledgment" indicating that they had "read and fully understand the City of Ontario's Computer Usage, Internet and E-mail policy." *Quon*, 529 F.3d at 896. The Employee Acknowledgment also stated that "[t]he City of Ontario reserves the right to monitor and log all network activity including e-mail and Internet use, with or without notice," and that "[u]sers should have no expectation of privacy or confidentiality when using these resources." *Id.* Though the policy did not explicitly address text messages, a meeting was convened in which all present were informed that the pager messages "were considered e-mail, and that those messages would fall under the City's policy as public information and eligible for auditing." *Id.* This statement was later memorialized in a memorandum sent to all supervisory personnel, including the employees at issue. *Quon v. Arch Wireless Operating Co., Inc.*, 445 F.Supp.2d 1116, 1124 (C.D. Cal. 2006). Despite these explicit signed acknowledgements, the Ninth Circuit, nevertheless found that the employees have an expectation of privacy in the text messages. *Quon*, 529 F.3d at 906-08.

the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent").

B. Finding an expectation of privacy based on an unauthorized practice by a rogue employee in the face of an official policy to the contrary completely ignores the operational realities of public agencies in general, and school districts in particular.

The Ninth Circuit's decision sends a clear message that an informal unauthorized policy instituted haphazardly by a non-policymaking employee will trump officially adopted policies. The court acknowledged that the employees signed the general "Computer Usage, Internet and E-mail Policy," attended a meeting in which it was made clear that the policy applied to the use of pagers, and that the informal policy was implemented by a non-policy making official, but nonetheless found that a reasonable expectation of privacy existed based on statements by the employee's direct supervisor who was also in charge of the pagers.

For school districts, which are governed by officially adopted school board policies and regulations, this rationale is particularly troubling because it completely undermines the existence and minimizes the utility of such policies. *See, e.g.*, Cal. Educ. Code § 35031(b) ("The governing board of each school district shall prescribe and enforce rules not inconsistent with law, or with the rules prescribed by the State Board of Education, for its own

government."). It is no exaggeration to say that the Ninth Circuit's disregard for officially adopted policies essentially undoes the basic governance structure of school districts.

Such a rule also goes against the weight of this Court's authority, which has traditionally credited officially adopted policies over a lower level employee's failure to adhere to these policies when analyzing a public entity's liability pursuant to 42 U.S.C. § 1983 (2010). For example, this Court said in *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988), that "[w]hen an official's discretionary decisions are constrained by policies not of that official's making, those policies, rather than the subordinate's departures from them, are the act of the municipality. Similarly, when a subordinate's decision is subject to review by the municipality's authorized policymakers, they have retained the authority to measure the official's conduct for conformance with *their* policies."

The decentralized nature of school districts is one in which school governance depends on official policy superseding the unauthorized practices of lower level employees. Any other standard radically diminishes a school district's ability to maintain an efficient and effective workplace, as well as safe schools.

School districts, like many other public entities, are decentralized and can be bureaucratic. Structurally, the final official policymaker for a school district is the local school board. For most districts, the school superintendent is next in the hierarchy and is the

chief executive officer charged with the day-to-day management of the district, including implementation of the school board's vision, directives, and policies. Below the superintendent are other "district level" administrators that answer to the superintendent (*e.g.*, typically cabinet level administrators like assistant superintendents, and other lower level administrators like directors). Finally, "school site" administrators are responsible for the management of a particular school, and directly supervise teachers and other site level staff, typically answering to "district level" administrators. For large school districts, there can be hundreds of school sites and thousands of site level administrators, each with direct supervisory responsibility for school staff.[8]

While all school employees are expected to adhere to all school board policies, the operational realities of any workplace and common sense dictate that not all employees will obey the rules all the time. Because of the decentralized nature of the day-to-day supervision of school employees, inconsistent enforcement of official policies, lax monitoring, and the emergence of unauthorized informal policies are inevitable. It would not be surprising to find supervisors within the same school site making contradictory statements or implementing policies differently from one another. Under the Ninth

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[8] For example, the Los Angeles Unified School District has 891 K-12 school sites. *See* http://notebook.lausd.net/pls/ptl/docs/page/ca_lausd/lausdnet/offices/communications/communications_facts/09-10engfingertip%20factsrev-2.pdf. The New York City public school system is made up of over 1600 schools. *See* http://schools.nyc.gov/AboutUs/default.htm.

Circuit's ruling this would mean that some school district employees had an expectation of privacy while others did not, depending on the actions or statements of their respective supervisors. For example, would the employees of a supervisor who never monitors a subordinate's emails have a reasonable expectation of privacy while the subordinates of an administrator who routinely monitors emails would not? At the extreme end of the spectrum, there will likely be some school supervisors that seek to manipulate official policies or implement unauthorized practices for their own personal gain.

Given these operational realities, the Ninth Circuit decision presents school districts with an insurmountable hurdle: perfectly implement technology acceptable use policies and agreements, or lose the right to implement them at all without risking a Fourth Amendment claim. Such a rule turns the hierarchy of school district governance on its head by stripping school boards of their policy making authority and elevating the status of a rogue employee to final decision maker, with no clear standard for determining what types of actions by the employee effectively negate the policy. The same employee, ironically, could be disciplined for failing to implement official policies. Establishing such a low threshold for finding a reasonable expectation of privacy in the face of official policy to the contrary will prevent schools from monitoring the electronic communication of teachers and school staff, ultimately to the detriment of students.

C. Part of the operational reality of a school district is the pervasive awareness and utilization of public records laws, making an expectation of privacy in such records unreasonable.

School districts, like other public entities, constantly receive and respond to public records requests from members of the public and media. Public records laws, applicable to a broad spectrum of government communications, are pervasive and exist in one form or another in every state. Roger A. Nowadzky, *A Comparative Analysis of Public Records Statutes*, 28 Urb. Law. 65 (1996). Contrary to the Ninth Circuit's implication that such a request by a "hypothetical member of the public" does not make an employee's belief in the privacy of a public record unreasonable, these requests are a significant part of the operational reality of school districts and are widespread and frequent. Indeed, the atmosphere in a public school work place is widely known to be open, such that an expectation of privacy is unreasonable.[9]

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[9] While it is true that not all electronic communications generated by a school district will be considered public records (*e.g.*, some "personal" communications, depending on state law), this nonetheless should not create a reasonable expectation of privacy in records that would otherwise be public. *See Griffis v. Pinal County*, 156 P.3d 418 (Ariz. 2007); *Denver Publ'g Co. v. Bd. of County Comm'rs*, 121 P.3d 190 (2005); *State v. Clearwater*, 863 So.2d 149 (2003). Since, under such public records laws, determining whether a record is public is a content-driven inquiry that will likely be conducted by someone other than the creator of the record, the individual creating the record will not know in advance its public or private nature

The localized nature of school districts and the proclivity for parent and community involvement in schools, make public record requests a salient feature of school governance. As a result, school boards typically adopt policies governing the maintenance and disclosure of records, and employees and staff are more often than not explicitly aware that they have no expectation of privacy in public records. In fact, school staff themselves assist in compiling records responsive to a public records request, particularly if they are in immediate possession of the responsive records.[10]

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and, therefore, should have no expectation that it will remain private.

For example, in a recent Michigan case, the court considered whether certain e-mail messages sought during the course of contract negotiations were public records under Michigan's version of the Freedom of Information Act. *Howell Educ. Ass'n MEA/NEA v. Howell Bd. of Educ.*, No. 288977, __ N.W.2d __, 2010 WL 290515 (Mich. App. Jan. 26, 2010). Although the court found that, since the e-mails pertained to union business they were "personal" and therefore not subject to disclosure under the public records law, during the course of litigation, 5,500 e-mails were reviewed to determine their nature. *Id.* at 6. The court also noted that personal emails can be transformed into public records (*e.g.*, if personal e-mails were used to support discipline imposed on a teacher for abusing an acceptable use policy, the e-mails would become public records). *Id.* at 8.

[10]The Ninth Circuit cites *Zaffuto v. City of Hammond*, 308 F.3d 485 (5th Cir. 2002) in support of its conclusion that the employees have a reasonable expectation of privacy in the text messages, despite the fact that they are public records. However, that case merely mentions public records law in passing. The court only noted that the city raised an argument that the existence of public records law suggests no expectation of privacy. *Id.* at 489. In *Zaffuto*, an officer made a personal

Schools are no doubt highly visible public entities. A school's duty to keep students safe is one of its most important functions. Therefore, employee misconduct in the school context can generate significant public concern. The type of misconduct by a school employee toward a student that is most concerning and is most likely to be evidenced by electronic communication is often highly sensationalized by the media. *See* Oglesby, *supra*; *see also* U.S. Department of Education, *supra,* at Appendix 1 (citing over 500 newspaper, news wire and broadcast references to school-related sexual abuse). It is not far-fetched to believe that such electronic communication would be the subject of a

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phone call from his office phone to his wife, which was recorded and disseminated. *Id.* at 487. The police department had a policy of recording phone calls, which was understood by the officers to mean that only incoming calls would be recorded. *Id.* at 489. The *Zaffuto* court found that the officer had a reasonable expectation of privacy in his outgoing phone call to his wife. *Id.* The court neither reached the public records question on its merits, nor provided any analysis of the issue.

The Ninth Circuit could also have cited to authority that mentions public records laws and finds *no* reasonable expectation of privacy. *E.g.*, *United States v. Angevine*, 281 F.3d 1130, 1133 (10th Cir. 2002) (mentioning policy that notified college professor that all electronic messages are presumed to be public records and contain no right of privacy or confidentiality except by statute, and finding no reasonable expectation of privacy); *Walls v. City of Petersburg*, 895 F.2d 188, 193-94 (4th Cir. 1990) (no reasonable expectation of privacy in information because it is already a part of the public record); *Biby v. Bd. of Regents of the Univ. of Nebraska at Lincoln*, 419 F.3d 845, 848 (8th Cir. 2005) (mentioning in passing that university computer policy states it will only search files if a legitimate reason exists, including response to a public records request, and finding no reasonable expectation of privacy).

public records request, eliminating a reasonable expectation of privacy in such communications.

The important and prominent position of schools in the community, as well as state public records laws that are meant to ensure transparent governance, make it doubtful that society is prepared to consider an expectation of privacy in workplace electronic communications reasonable.

II. A SCHOOL DISTRICT'S INTEREST IS NOT ONLY IN THE SUPERVISION, CONTROL AND EFFICIENT OPERATION OF THE WORKPLACE, BUT MORE IMPORTANTLY, IN SAFEGUARDING THE HEALTH, SAFETY AND WELFARE OF ITS STUDENTS.

Even if public employees do have a reasonable expectation of privacy in workplace electronic communications despite an official policy to the contrary, a school district's interest in the efficient and effective operation of the workplace, combined with its more important task of safeguarding student safety, far outweigh an employee's privacy interest in such communications. *See O'Connor*, 480 U.S. at 719-20 ("In the case of searches conducted by a public employer, we must balance the invasion of the employees' legitimate expectation of privacy against the government's need for supervision, control, and the efficient operation of the workplace.").

Public employers have legitimate interests in regulating workplace electronic communications,

including the "government's need for supervision, control, and the efficient operation of the workplace." *O'Connor,* 480 U.S. at 719-20. Employers may also be held liable for the conduct of employees who irresponsibly use workplace technologies, particularly in the areas of sexual harassment and hostile work environment claims. H. Jospeh Wen, Dana Shwieger & Pam Gershuny, *Internet Usage Monitoring in the Workplace: Its Legal Challenges and Implementation Strategies*, 24 Info. Sys. Mgmt. 185, 191 (2007); Lavis, *supra*, at 524. The improper use of workplace technologies often implicates performance issues, the waste of valuable time and resources, and theft of the employer's resources, all of significant concern to public employers that are entrusted with tax-payer dollars. *Id.*

Public school employers also must guard against the improper sharing of confidential information. School districts are responsible for securely maintaining, not only employment records, but pupil records as well. Mark C. Blom, *How Safe Is A School District's Information*? Inquiry & Analysis (NSBA's Council of School Attorneys, Alexandria, VA), Oct. 2009, at 6, 7. The Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g (2010), the Health Insurance Portability and Accountability Act, 42 U.S.C. § 1320d (2010), special education laws, and state records laws all impose legal obligations on schools to secure confidential records, a task which has become increasingly difficult to do as such records have become computerized. In reality, the burden of maintaining the confidentiality of such information rests most heavily on the average school employee that accesses this information, as a matter of course,

on a daily basis. It is crucial that schools maintain the ability to monitor the electronic media accessible to employees, to ensure compliance and to enforce these confidentiality laws. In fact, the United States Department of Education recommends that, in the wake of an unauthorized disclosure, school districts investigate and determine how the incident occurred, including who had control or responsibility for the compromised information. This necessarily implicates an employer's right to search electronic communications to determine the source of a breach, prevent future unauthorized disclosures, and remedy any harm done by the breach.

Even more important than these considerations is the district's interest in maintaining student safety. School teachers enjoy a position of trust and influence with their students.[11] In recognition of teachers' influential role, many states have incorporated a moral character component into teacher licensing and dismissal statutes.[12] This Court has recognized that "school authorities have

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[11] *See Bd. of Educ. of City of Los Angeles v. Swan*, 41 Cal.2d 546, 552 (1953) ("A teacher. . .in the public school system is regarded by the public and pupils in the light of an exemplar, whose words and actions are likely to be followed by the children coming under her care and protection.") (citing Voorhees, The Law of Public Schools, § 62, p. 136) *abrogated on other grounds by Bekiaris v. Board of Educ.*, 6 Cal.3d. 575, 588 (1972); *accord Clarke v. Board of Educ. of School District of Omaha*, 215 Neb. 250, 256-57 (1983).

[12] *E.g.*, Cal. Educ. Code § 44345 (2010) (application for issuance of teaching credential may be denied if applicant fails or refuses to furnish reasonable evidence of good moral character); Cal. Educ. § 44932 (immoral conduct as ground for teacher termination).

the right and the duty to screen the officials, teachers and employees as to their fitness to maintain the integrity of the schools as a part of ordered society. . . ." *Adler v. Bd. of Educ.*, 342 U.S. 485, 493 (1952) *overruled on other grounds by Keyishian v. Bd. of Regents of Univ. of State of New York.*, 385 U.S. 589 (1967).

An unfortunate reality for school districts is that some school employees will engage in inappropriate relationships with children. In 2004, the United State Department of Education conducted a review of existing literature regarding educator sexual misconduct. U.S. Department of Education, *supra*, at 1.0. The report found that, based on existing literature, the prevalence of educator sexual misconduct ranged from 13% to 34% of females and 7% to 16% of males reporting abuse. *Id.* at 3.0. Sadly, these are not insignificant numbers.[13]

Research shows that most educator sexual abuse is characterized by "grooming" behaviors and enticement. U.S. Department of Education, *supra*,

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[13] *See also Doe 20 v. Bd. of Educ. of Cmty. Unit Sch. Dist., No. 5*, No. 09-1158, __ F.Supp.2d. __, 2010 WL 145782 (C.D. Ill. Jan. 11, 2010) (first grade teacher alleged to have assaulted female students, as well as used school district computer and e-mail to view and subscribe to pornography); *K.J. v. Arcadia Unified Sch. Dist.*, 172 Cal.App.4th 1229, 1234-35 (2009) (teacher that allegedly maintained sexual relationship with student had history of late night frequent e-mails to other female students as well); *Baumgardt v. Wausau Sch. Dist. Bd. of Educ.*, 475 F Supp.2d 800, 802 (W.D. Wis. 2007) (high school coach allegedly text messaged female student that he loved her, wanted to be with her, and eventually sexually assaulted student).

at 6.2; *see also* Donald F. Austin & Michael A. Patterson, *Protecting Children From Sexual Misconduct by School Employees*, Inquiry & Analysis (NSBA's Council of School Attorneys, Alexandria, VA), May 2008, at 1. Grooming is a process "where an abuser selects a student, gives the student attention and rewards, provides the student with support and understanding, all the while slowly increasing the amount of touch or other sexual behavior. The purpose of grooming is to test the child's ability to maintain secrecy, to desensitize the child through progressive sexual behaviors, to provide the child with experiences that are valuable and that the child won't want to lose, to learn information that will discredit the child, and to gain approval from parents. Grooming allows the abuser to test the student's silence at each step. It also serves to implicate the student, resulting in children believing that they are responsible for their own abuse because, 'I never said stop.'" *Id.* (citation omitted). Importantly, grooming behaviors often involve engaging in peer-like behavior, which in today's digital age, includes communication via cell phone, text message, e-mails, and electronic social networking media, like Myspace, Facebook and Twitter.[14]

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[14] *See* Jennifer Steinhauer & Laura M. Holson, *As Text Messages Fly, Danger Lurks*, N.Y. Times, Sept. 20, 2008, available at http://www.nytimes.com/2008/09/20/us/20messaging.html (noting that "[t]eenagers and young adults have adopted text-messaging as a second language" and 13 to 17 year old American teenagers sent or received an average of 1,742 text messages in the second quarter of 2008); *see also* Austin & Patterson, *supra*, at 5 (inappropriate boundary invasions into a child's personal space and life include "[u]sing

It is not difficult to see how the nature of the teacher-student relationship makes children particularly vulnerable to such misconduct. It is within this context that schools must effectively manage the proliferation of new technologies. A byproduct of the increased use of technologies is the increased potential for abuse by employees, putting students directly at risk. A CNN news brief reported, "[i]t's happened again. A teacher is accused of having sex with a student and, like many times before, cell phone calls and texting reportedly had a role in sexually abusing a minor." *See* Oglesby, *supra*. The article goes on to note that "[t]he same cell phones that parents buy as safety devices for their children are the gadgets that pedophiles and predators use to prep kids for sexual encounters."[15] *Id.* Before cell phones and other forms of electronic communication, "grooming" behaviors could have been perceived by other adults. Now, technology allows a teacher to show no outward signs of interest in a child, but still maintain an ongoing relationship. *Id.* According to Betsy Ramsey, chair of the DeKalb County Domestic Violence Task Force, "[t]he wooing via text

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e-mail, text-messaging, or websites to discuss personal topics or interests with students.").

[15] The article also chronicles a case in Fayette County, Georgia in which a teacher sent a message to a 14-year old student's cell phone asking for a nude picture of her, a case in Pennsylvania where a third grade teacher sent a young girl poems via e-mail, which gradually escalated into a sexual relationship, and a case in Florida in which a teacher sent a 13-year-old boy pornography and illicit messages via e-mail. Oglesby, *supra*.

messages, cell phone calls and e-mail is so subtle, so affirming and so indulgent, that by the time a teacher makes inquiries involving nudity, a child probably isn't alarmed." *Id.*

In school, students are taught to trust teachers, and teachers are more often believed than students. U.S. Department of Education, *supra*, at 6.1. As a result of this power imbalance and the potential invisibility of employee misconduct due to new technologies, monitoring workplace technologies and viewing the content of electronic communications are essential to detecting and providing a clear record of a wide range of employee misconduct.[16] School boards must have meaningful enforceable policies that allow them to intervene in the case of any teacher misconduct. Stopping "inappropriate boundary invasions" early can prevent more serious abuse from occurring. Austin & Patterson, *supra*, at 6. Similarly, school board policies that permit access to employee electronic communications facilitate awareness of dual relationships that exist between teachers and students in small communities (*e.g.*, students may interact with teachers in the community, whether through church or Little League teams), so that school administrators can exercise appropriate judgment when evaluating a teacher-student relationship and

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[16] *See Leventhal v. Knapek*, 266 F.3d 64, 73-74 (2d Cir. 2001) (where investigation was broadly aimed at uncovering evidence that employee was using office computer for non-work purposes and viewing of computer content accomplished the task of uncovering such evidence, Fourth Amendment rights not violated despite some expectation of privacy).

be alert to any potential misconduct.[17] Therefore, given the significant interest of school districts in maintaining safe schools and curbing employee misconduct, a policy allowing employers to monitor electronic communications of employees is especially important for school districts.

CONCLUSION

The dissent in the Ninth Circuit's denial of rehearing *en banc* noted that "[t]his case is, at its core, a workplace privacy case. The panel turns its back on the 'common-sense realization that government offices could not function if every employment decision became a constitutional matter.'" *Quon v. Arch Wireless Operating Co., Inc.*, 554 F.3d 769, 779, denial of rehearing and rehearing

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[17] Notably, the Texas educators' code of ethics explicitly proscribes grooming-type behaviors, including prohibitions against revealing confidential information to students, furnishing alcohol or drugs, and soliciting or engaging in sexual conduct. 19 Tex. Admin. Code § 247.2 (2010).

Additionally, at least one state, Louisiana, has found these concerns so pressing that it has enacted legislation specifically requiring school boards to formulate policies and procedures requiring all electronic communication by a school employee to a student related to educational services be via means provided by the school system, and prohibiting such communication for any purpose not related to the provision of educational services. La. Rev. Stat. § 17:81(Q)2(b) (2009). School boards must also institute a monitoring policy requiring school employees to report any time they communicate electronically with students by a means not provided by the school system, and implement consequences for violations of these policies. *Id.* at §§ 17.81(Q)(2)(c) & (e).

en banc (9th Cir. 2009)(Ikuta, dissenting)(quoting *O'Connor*, 480 U.S. at 722). Should the Ninth Circuit's decision stand, a school district will be faced with the specter of litigation each time it seeks to investigate employee misuse of workplace technologies, despite the existence of explicit acceptable use policies and agreements. Such an outcome "improperly hobbles government employers from managing their workforces." *Quon*, 554 F.3d at 774. For schools, this outcome jeopardizes student safety.

For the foregoing reasons, this Court should reverse the decision of the Ninth Circuit of Appeals in this matter.

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

CITY OF ONTARIO, ONTARIO POLICE DEPARTMENT, and LLOYD SCHARF,

Petitioners,

v.

JEFF QUON, JERILYN QUON, APRIL FLORIO, and STEVE TRUJILLO,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR AMICUS CURIAE NEW YORK INTELLECTUAL PROPERTY LAW ASSOCIATION IN SUPPORT OF RESPONDENTS

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BRIEF FOR AMICUS CURIAE NEW YORK INTELLECTUAL PROPERTY LAW ASSOCIATION IN SUPPORT OF RESPONDENTS

STATEMENT OF INTEREST OF AMICUS CURIAE

This brief *amicus curiae* is submitted in support of Respondents by the New York Intellectual Property Law Association (the "NYIPLA" or the "Association"), a professional association of more than 2,000 attorneys in the United States and abroad whose interests and practices lie in the areas of patent, copyright, trademark, trade secret, privacy, and other intellectual property law and emerging technologies.[1]

The NYIPLA strives to educate the public and members of the bar in the fields of intellectual property law and privacy law and continually works with foreign associations to harmonize applicable international law. NYIPLA members and in particular its Privacy Law Committee, represent both plaintiffs and defendants in developing and protecting cutting edge technologies, including emerging communications technologies that give rise to the kinds of privacy concerns that arise in this case. As a result, the NYIPLA has a particularly

1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, or its counsel, made a monetary contribution intended to fund its preparation or submission. The parties have consented to the filing of this brief and such consents are being lodged herewith.

strong interest in the meaning and application of privacy laws applied in the workplace on and in connection with such technologies. NYIPLA members include in-house attorneys working for businesses that own, enforce and challenge intellectual property interests and privacy interests, as well as attorneys in private practice who represent both intellectual property owners and accused infringers. NYIPLA members frequently engage in intellectual property licensing matters, and address workplace policy issues concerning ownership of intellectual properties, trade secrets and privacy rights.[2]

SUMMARY OF THE ARGUMENT

Much of the controversy surrounding this case has focused on whether, despite stated department policy to the contrary, a reasonable expectation of privacy was created by the verbal instructions of Officer Quon's superior, Lieutenant Duke, that Quon could avoid any review of his text messages on his department-issued

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2. The arguments set forth in this brief were approved on or about March 22, 2010 by an absolute majority of the total number of officers and members of the Board of Directors (including those who did not vote for any reason, including recusal), but may not necessarily reflect the views of a majority of the members of the NYIPLA or of the organizations with which those members are affiliated. After reasonable investigation, the NYIPLA believes that no person who voted in favor of the brief, no attorney in the firms or companies with which such persons are associated, and no attorney who aided in preparation of this brief represents a party in this litigation. Some such persons may represent entities that have an interest in other matters that may be affected by the outcome of this proceeding.

pager simply by paying for any excess charges himself. However, the very nature of the specific technology here at issue – a mobile device – and the manner of use (outside any traditional workplace and both on and off duty) places this case directly amidst the currently (and rapidly) evolving universe of personal and mobile computing, and a swiftly changing and increasingly amorphous workplace. Even if the broad outlines of the law governing workplace privacy rules are reasonably clear in upholding most company policies permitting monitoring of office emails and computer use, this case resides at the very periphery of that workplace. Thus, to speak of "operational realities of the workplace" as Petitioners repeatedly do, is only to begin to frame the question, not to provide an answer. Unlike the era of the office cubicle or even private office-room, when *O'Connor* v. *Ortega*, 480 U.S. 709, 107 S. Ct. 1492 (1987), was decided, the "operational realities of the workplace" are today in rapid and fundamental transition. New mobile computing technologies, new electronic storage media, as well as new communications media, such as Facebook, Twitter and other so-called "Web 2.0" applications, are reshaping where and how Americans work.

The NYIPLA submits this brief to attempt to clarify that, above and beyond the wide acceptance of the premise that employers (public and private) can and do set privacy policies regarding employees' use of office computers and email communications, the most vexing issues raised by this case - and its broader implications for workplace privacy in general - are not whether the City of Ontario could have set reasonable policies for monitoring computer use on its own servers; how that

policy applied to email use in an office setting, nor whether Officer Quon would have had a reasonable expectation of privacy in emails sent over the City of Ontario network. Petitioners' own formal policy confirms he most likely would not.

Rather, five factors place this case outside the scope of the typical office privacy policy dispute: (i) the Respondents used mobile pagers, not office computers; (ii) the mobile pager, by its very nature, could be and was used when officer Quon was off duty as well as on; (iii) the network over which the text messages were sent was not the government's network but that of a third party, Arch Wireless; (iv) text messaging on a third party's network did not expressly fall within the scope of the Petitioners' written privacy policy (and hence was the subject of a dispute as to whether advice was given orally extending the written privacy policy to such uses); and (v) for this specific and arguably more personal handheld mobile device, the Petitioners' computer use policy was further placed in doubt by instructions of Lieutenant Duke and actual office practices, arguably permitting private use of the pagers, provided that the officers paid for any overages in use.[3]

At the very most there was in this case an informal (verbal) policy extending the formal email policy to the

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3. Because the communications here at issue did not occur on the Petitioners' email system, arguably less directly relevant is the question whether Respondents' personal uses of the wireless pagers fell within the exception to the Petitioners' written privacy policy under which "[s]ome incidental and occasional personal use of the e-mail system is permitted if limited to 'light' personal use." (Pet'r Br. 4.)

pagers; yet, there was also an actual practice of not enforcing that informal policy, to the extent it did exist. In such circumstances, the operational realities of this workplace (and others like it) may well support a reasonable expectation of privacy under developing legal doctrines requiring at least some form of notice and consent before privacy protections are lost.

The existence of public records laws permitting potential public scrutiny of police department records, such as the text messages here at issue, raise questions that may best be viewed against the backdrop of the parallel pressures in civil litigation from electronic discovery. Without questioning that the public has *some* right to inquire into the operations of government-run entities, thus making electronic records *potentially* relevant to public inquiry and inspection, civil and criminal litigation now routinely requires private and public entities to save, search and share precisely such communications. Thus, the same evolving operational realities of the workplace require businesses (private and public) to develop not only privacy policies that may increase their control over employee communications but also (and simultaneously) document retention policies freeing the businesses from many of the very same duties to maintain control over the same or similar types of electronic records – many of which are essentially private communications that simply happen to find their way onto office networks because of the ways employees increasingly blend their personal and business lives. However, merely because casual communications that, in an earlier era, would never have been recorded at all now leave electronic traces that can be stored or recovered, does not make all such records relevant to the operation of the workplace, even where the merging of

personal and business lives makes them a reality of that workplace. This Court and others have refused FOIA requests when the subject matter undermined privacy expectations. A ruling that there is no reasonable expectation of privacy in such communications may expose to public scrutiny many electronic records that businesses themselves would deem private and over which they do not wish to exercise control.

In summary, the NYIPLA submits that this case thus should not be the vehicle for calling into question any of the widely used office policies that courts have enforced without hesitation – in both public and private contexts – permitting employers to set reasonable limits on workplace privacy rights and to preserve and maintain needed controls over office computer and communications equipment. However, as communications technologies continue to evolve (at a pace unmatched historically); as social expectations regarding privacy in such communications evolve in parallel; and as applicable privacy law continues its own companion evolution (with considerable disagreement still evident among the courts on many issues); this case is also ill-suited for drawing any broad new legal rules (such as the presumption the United States Government proposes in its amicus brief (Amicus Br. 14) that employees – like mere invitees – have no legitimate expectations of privacy independent of those rights expressly granted by the employer). Rather, for these unique circumstances and these still-novel and still-evolving technologies, the incremental, case-by-case approach endorsed in *O'Connor* in 1987 remains singularly appropriate. The law should be allowed to continue to evolve as societal expectations of privacy or the lack thereof become better-settled.

Finally, the NYIPLA notes the similarity of the Fourth Amendment standard of a "reasonable expectation of privacy" to the common law standard of "intrusion upon seclusion" that would be "highly offensive to a reasonable person", which also turns on whether the party has a "reasonable expectation of privacy." *In re Asia Global Crossing, Ltd.*, 322 B.R. 247 (S.D.N.Y. 2005), explains:

> A right of privacy is recognized under both the common law, see Restatement (Second) of Torts, 652(B) (1977) (discussing the tort of "intrusion on seclusion") and the Fourth Amendment to the United States Constitution. In both cases, the aggrieved party must show a reasonable expectation of privacy.

Id. at 256. *See also, Hilderman* v. *Enea TekSci, Inc.*, 551 F. Supp. 2d 1183, 1203 (S.D. Cal. 2008); *Pietrylo* v. *Hillstone Rest. Grp.*, No. 06-5754 (FSH), 2008 WL 6085437, at * 7 (D.N.J. July 25, 2008); *Brown-Criscuolo* v. *Wolfe*, 601 F. Supp. 2d 441, 455 (D. Conn. 2009). Not surprisingly, the lower court decisions in *Quon* have been widely cited by other courts outside the scope of Fourth Amendment claims of privacy, but, rather, under state law privacy claims, and in the *private* employment context. *See, e.g., Pure Power Boot Camp Inc.* v. *Warrior Fitness Boot Camp, LLC*, 587 F. Supp. 2d 548 (S.D.N.Y. 2008); *Stengart* v. *Loving Care Agency*, 973 A.2d 390 (N.J. Super. Ct. App. Div. 2009); *Louis Vuitton Malletier S.A.* v. *Akanoc Solutions, Inc.*, No. C 07-03952 JW, 2008 U.S. Dist. LEXIS 63115 (N.D. Cal. Aug. 7, 2008); *Flagg* v. *City of Detroit*, 252 F.R.D. 346 (E.D. Mich. 2008). The decision of this Court will undoubtedly cast an even

wider shadow in non-Fourth-Amendment cases than have the lower court decisions in this action.[4]

For these reasons, continued application of the case-by-case approach adopted in *O'Connor* v. *Ortega* counsels caution in defining the scope of privacy protections. The holding of the Ninth Circuit thus should be affirmed or the matter should be remanded to resolve any uncertainties what was the communications and privacy policy and to what extent it was enforced.

FACTUAL BACKGROUND

The record shows that the pagers at issue here were used by Respondents to create text messages on the Arch Wireless network. The messages were stored by Arch Wireless in a format capable of being retrieved. The messages were not emails sent on the network maintained by the City of Ontario Police Department ("OPD"). The messages were sent by Petitioners while both on duty and off duty, and the pagers were provided precisely because of the expectation that the officers might need to be available any time of day or night (*i.e.*, "24/7"). *Quon* v. *Arch Wireless Operating Co., Inc.*, 554 F.3d 769, 770 (9th Cir. 2009).

The actual OPD "Computer Usage, Internet and E-mail Policy" provided in relevant part as follows:

> C. Access to all sites on the Internet is recorded and will be periodically reviewed by

4. The lower court decisions in *Quon* also had to consider California's constitutionally recognized right of privacy, which generally sets a higher privacy standard than recognized by other states. *See*, California Constitution, Article 1, § 1.

> the City. The City of Ontario reserves the right to monitor and log all network activity including *e-mail* and Internet use, with or without notice. Users should have no expectation of privacy or confidentiality when using these resources.
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> D. Access to the Internet and the *e-mail* system is *not* confidential; and Information produced either in hard copy or in electronic form is considered City property. As such, these systems should not be used for personal or confidential communications. Deletion of e-mail or other electronic information may not fully delete the information from the system.

Quon v. *Arch Wireless Operating Co., Inc.*, 529 F.3d 892, 896 (9th Cir. 2008). Although the record indicates that, at a staff meeting, the officer responsible for use and provision of the OPD's electronic equipment, Lieutenant Steven Duke, advised the department that this policy would apply to text messages, Officer Quon, while present at the meeting, did not recall being told of the policy. *Id.* Minutes of the meeting include some brief mention of this announcement extending the email policy to pagers, yet the Ninth Circuit concluded that "[t]he record [was] clear that the City had no official policy governing the pagers." 554 F.3d at 770. At any rate, the department in practice did not follow this stated policy. Rather, the content of text messages remained private provided that individual officers simply reimbursed the department for any charges from exceeding the monthly limit of 25,000 characters. The District Court noted: "Only when the personnel in question disputed the

overages – either claiming that the use was work-related or otherwise – did Lieutenant Duke make it clear that he would endeavor to audit the contents of the messages sent and received on the pager." *Quon* v. *Arch Wireless Operating Co., Inc.*, 445 F. Supp. 2d 1116, 1124 (C.D. Cal. 2006). At least three or four times when his monthly text messages exceeded the 25,000 character limit, Officer Quon availed himself of this offer to pay for any overages (and preserve his messages from wider scrutiny).

Moreover, the record provides no evidence of instances in which the informal verbal policy was actually enforced prior to the review of Respondents' email messages that gave rise to this litigation. To the contrary, the district court found that "before the events that transpired in this case the department did not audit any employee's use of the pager for the eight months they had been in use," 445 F. Supp. 2d at 1141, and that the practice "allowed, condoned and even encouraged" officers to exceed the character limit. *Id.* at 1144.

ARGUMENT

A. *The "Operational Realities" of the Workplace and Expectations of Privacy Are Rapidly Evolving*

Current law is well-settled that, under clear and reasonable office policies, employers are permitted to have access to and review employee emails and other documents and records created on office communications and computer equipment. Where such policies exist, the courts have consistently declined to recognize a reasonable expectation of privacy in emails

and other communications and records transmitted over or stored on company hardware. *See U.S.* v. *Ziegler*, 456 F.3d 1138, 1144 (9th Cir. 2006) (listing cases[5]). *See also Pure Power Boot Camp Inc.*, 587 F. Supp. 2d at 559-60 (listing cases[6]). The NYIPLA does challenge such settled law.

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5. *Biby* v. *Bd. of Regents*, 419 F.3d 845, 850-51 (8th Cir. 2005) (no reasonable expectation of privacy existed where a policy reserved the employer's right to search an employee's computer for a legitimate reason); *U S.* v. *Thorn*, 375 F.3d 679, 683 (8th Cir. 2004), *cert. granted and judgment vacated on other grounds by* 543 U.S. 1112, 125 S. Ct. 1065, 160 L. Ed. 2d 1050 (2005) (no expectation of privacy where public agency's computer-use policy prohibited accessing sexual images, expressly denied employees any personal privacy rights in the use of the computer systems, and provided the employer the right to access any computer to audit its use); *U.S.* v. *Angevine*, 281 F.3d 1130, 1133-35 (10th Cir. 2002) (no expectation of privacy where employer's computer-use policy included monitoring and claimed a right of access to equipment); *Muick* v. *Glenayre Electronics*, 280 F.3d 741, 743 (7th Cir. 2002) ("Glenayre had announced that it could inspect the laptops that it furnished for the use of its employees, and this destroyed any reasonable expectation of privacy. . . "); *Wasson* v. *Sonoma County Jr. Coll. Dist.*, 4 F. Supp. 2d 893, 905-06 (N.D.Cal. 1997) (no expectation of privacy where policy gave the employer "the right to access all information stored on [the employer's] computers"). *See also, TBG Ins. Services Corp.* v. *Superior Court*, 96 Cal. App. 4th 443 (2d Dist. 2002) (permitting employer monitoring of e-mail where employee acknowledged monitoring policy as part of employee handbook notwithstanding California's constitutional right of privacy).

6. *U.S.* v. *Simons*, 206 F.3d 392, 398 (4th Cir. 2000) ("Therefore, regardless of whether Simons subjectively believed that the files he transferred from the Internet were

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However, even against this background, courts have come to recognize areas where the lines between professional and personal, or between "business" and "nobody's business," are hard to draw. Business increasingly encroaches on personal life, and mobile computing and home office uses of even business equipment have begun to complicate the task of disentangling where work ends and personal life begins. For example, attorney-client communications – even when made using office equipment - have raised vexing questions, increasingly inclining courts to favor the privacy rights of the individual, even where the literal language of an office privacy policy might suggest otherwise. *Convertino* v. *U.S. Dep't of Justice*, 04-CV-0236, slip op. at 19 (D.D.C. Dec. 10, 2009); *Curto* v. *Medical World Communications, Inc.*, No. 03-CV-6327 (DRH)(MLO), 2006 WL 1318387, at * 9 (E.D.N.Y. May 15, 2006); *Stengart*, 973 A.2d 390; *Brown-Criscuolo*, 601 F. Supp. 2d 441. Similarly, personal records, such as medical or financial data, might merit privacy protections notwithstanding employee needs to

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private, such a belief was not objectively reasonable after FBIS notified him that it would be overseeing his Internet use."); *Thygeson* v. *U.S. Bancorp*, No. CV-03-467-ST, 2004 WL 2066746, at *21 (D.Or. Sept. 15, 2004) ("[w]hen, as here, an employer accesses its own computer network and has an explicit policy banning personal use of office computers and permitting monitoring, an employee has no reasonable expectation of privacy."); *Muick* v. *Glenayre Electronics*, 280 F.3d 741, 743 (7th Cir. 2002). *See also, Silverberg & Hunter LLP* v. *Futterman*, No. 002976/02, 2002 WL 24461954 (N.Y. Sup. Ct. Jul 3, 2002) ("Protecting files with a password may not be used to bootstrap a privacy claim where the recognized expectation is that none exists.").

communicate such information using the most expedient means at their disposal: the office laptop, a PDA, cell phone or other such device. Individuals can and do use personal communications devices (such as Blackberries and other PDA's and cell phones) and new communications media (such as individual email accounts, Facebook, MySpace, Twitter, blogs and the like) in connection with the performance of their jobs. Some companies use internal social networks for various purposes and professional networks such as LinkedIn and Spoke are also widely used for business purposes. An automatic loss of privacy rights under such circumstances need not be implied. Similarly, when an employer issues to its employees communication devices that permit monitoring of physical location (*e.g.*, by GPS), it is hardly clear that such capability or mere use of such devices entails consent to monitoring. In all such instances, what is personal and what is not can be elusive. This case well exemplifies these challenges as the pagers were evidently issued to officers because of their need to be on-call "24/7". *See Quon*, 554 F.3d at 770.

While the legitimate needs of employers to monitor and control use of networks they maintain must be preserved, the salacious nature of at least some of the text messages here at issue should not unduly color the full range of privacy concerns raised by this case, the technologies involved, and the evolving nature of the workplace. These Respondents brought into the mobile workplace matrix an aspect of their personal lives less likely to elicit sympathy than would the concerns of cancer victims or AIDS patients needing to reach their doctors during the workday; or individuals requiring

advice of counsel or an accountant because of pressing legal or financial concerns. Use by such employees of office-issued BlackBerries or even office cell phones en route to work or while traveling as part of their job responsibilities may well be accompanied by a reasonable expectation of privacy. Innumerable other examples where individuals mix work and personal concerns on office communications devices (under circumstances perhaps more sympathetic than Officer Quon's), are readily imagined.

As the "operational realities of the workplace" change, *O'Connor* dictates that no one rule of law should sweep all such individual circumstances under one hardened standard. Indeed, *O'Connor* holds that even in the circumstances of public employment, a case-by-case analysis should be undertaken to determine if the employee might have a reasonable expectation of privacy. If so, that expectation should be balanced with the government's need for workplace efficiency, supervision and control. 480 U.S. at 725-726 ("[P]ublic employer intrusions on the constitutionally protected privacy interests of government employees for noninvestigatory, work-related purposes, as well as for investigations of work-related misconduct, should be judged by the standard of reasonableness under all the circumstances.")[7] Given the nearly endless varieties of workplace environments, best practices suggest that the employer seeking to ensure a right to review employee records (and correspondingly limit expectations of

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7. *See also*, Andrew B. Serwin, *Information Security and Privacy, A Practical Guide to Federal, State and International Law*, Volume 1, § 15:3, pp. 1315-1316 (2008).

privacy) should establish clear workplace rules and apply them with consistency. Similarly, the technology covered by such rules should be identified and expressly incorporated into the guidelines. Finally, the individual employee should have some fair notice of the rules – if not also a realistic opportunity to object or consent. As shown below, these standards are still evolving. They should be allowed to continue to evolve.

B. *A Mobile Pager Is Not An Office Computer and May Create Unique Expectations of Privacy*

As noted above, where there exist workplace rules establishing the employer's right of access to and review of records created on company computer networks or communications equipment, the law generally does not recognize a reasonable expectation of employee privacy in such records. However, given the evolving nature of the workplace and communications technologies, areas of uncertainty continue to emerge. *Stengart*, explained:

> Certainly, the electronic age – and now the speed and ease with which many communications may now be made - has created numerous difficulties in segregating personal business from company business. Today many highly personal and confidential transactions are commonly conducted via the Internet, and may be performed in a moment's time.

973 A.2d at 400. To be sure, *Stengart* involved a particularly sensitive issue (whether privilege was lost in attorney-client privileged emails stored on a password protected laptop), yet the court cast this narrow issue

against the backdrop of the broader dilemma. *Accord*, *Curto*, 2006 WL 1318387 at * 8-9 (finding a right of privacy and no waiver of work-product or attorney-client privileges where laptops were used in home office and where the company's computer policy was somewhat ambiguous and not often enforced, thus lulling the plaintiff into an expectation of privacy.) Precisely because the law is still evolving, it should come as no surprise that the cases are divided on such issues. *See Scott* v. *Beth Israel Med. Ctr.*, 17 Misc.3d 934, 847 N.Y.S.2d 436 (N.Y. Sup. Ct. 2007) (attorney client privilege waived where, under email policy, "[e]mployees have no personal privacy right in any material created, received, saved or sent on the Medical Center's communication or computer systems."); *Long* v. *Marubeni America Corp.*, No. 05 Civ 639 (GEL)(KNF), 2006 WL 2998671 (S.D.N.Y. Oct. 19, 2006) (privilege waived); *TBG Ins. Servs. Corp.* v. *Superior Court*, 96 Cal. App. 4th 443, 451-52, 117 Cal. Rptr. 2d 155 (2002) (cited by Petitioner at p. 32, finding no reasonable expectation of privacy in computer provided for home use), and *Bohach* v. *City of Reno*, 932 F. Supp. 1232, 1234-35 (D. Nev. 1996) (cited by Petitioner at p. 34, and finding that any expectation of privacy in police pagers was diminished by department order that messages would be logged onto the system, and banning certain types of messages).

Where the scope and clarity of company policies are less then lucid; where enforcement of those policies has been inconsistent, or where employee consent has been in doubt, courts have been readier to recognize the reasonableness of employee expectations of privacy. *Convertino*, slip op. at 19 (reasonable expectation of

privacy in emails to attorney sent over office network where "[t]he DOJ maintains a policy that does not ban personal use of the company email. Although the DOJ does have access to personal emails sent through this account, Mr. Tukel was unaware that they would be regularly accessing and saving e-mails sent from his account."); *Brown-Criscuolo*, 601 F. Supp. 2d at 449 (reasonable expectation of privacy of password-protected email files of school teacher where policy provided that "[s]ystem users a limited privacy expectation in the contents of their personal files..."); *Curto*, 2006 WL 1318387 at * 3 (in a home-office environment, "the lack of enforcement by MWC of its computer usage policy created a 'false sense of security' which 'lull[ed]' employees into believing that the policy would not be enforced"); *People* v. *Jiang*, 131 Cal. App. 4th 1027, 33 Cal. Rptr. 3d 184 (Ct. App. 2005) (reasonable expectation of privacy in password protected files of attorney-client communications upheld where office privacy policy covered emails and voicemails but did not expressly cover records saved on company-issued laptop but not communicated over employer's email server;); *Hilderman*, 551 F. Supp. 2d at 1204 (genuine issue of fact whether policy allowing individuals to purchase company laptops created a reasonable expectation of privacy, even where means of searching laptop contents ultimately was deemed reasonable"); *U.S.* v. *Slanina*, 283 F.3d 670, 676 (5th Cir. 2002) ("The city did not disseminate any policy that prevented the storage of personal information on city computers and also did not inform its employees that computer usage and internet access would be monitored."), *vacated on other grounds*, 537 U.S. 802, 123 S. Ct. 69, 154 L. Ed. 2d 3 (2002), *on appeal after remand*, 359 F.3d 356 (5th Cir. 2004)

(per curiam); *Leventhal* v. *Knapek*, 266 F.3d 64, 74 (2d Cir. 2001) (although means of search ultimately deemed reasonable, employee had reasonable expectation of privacy where insufficient evidence that employer "had a general practice of routinely conducting searches of office computers or had placed Leventhal on notice that he should have no expectation of privacy in the contents of his office computer."); *In re Asia Global Crossing, Ltd.*, 322 B.R. at 259 ("[t]he evidence is equivocal regarding the existence or notice of corporate policies banning certain uses or monitoring of employees emails."); *See also, Bloomberg, LP* v. *SEC*, 357 F. Supp. 2d 156 (D.D.C. 2004) (SEC chairman's electronic calendar was not an "agency record" even where it included personal and business appointments and even where it resided on agency server and was stored on agency back-up system where agency employees were "permitted 'limited use of office equipment for personal needs.").

Communications media are rapidly changing, and workplace realities are changing with the technology. Companies that today discourage use of Net 2.0 interactive media may decide tomorrow that they need such tools and will encourage workers to foster connections on Facebook, Twitter and other sites. The law is still unclear whether or to what extent accessing a Facebook or other personal site via a company's server entitles the company to have access to such activities. *See Thygeson* v. *U.S. Bancorp*, No. CV-03-467-ST, 2004 WL 2066746 (D. Or. Sept. 15, 2004) (finding at least some right of employer to monitor employee access of Netscape email account from work but only addressing of websites plaintiff visited, not content of emails);

Compare Pure Power Boot Camp Inc., 587 F. Supp. 2d 548 (employee's emails on personal "Hotmail" and "Gmail" accounts remained private even if viewed while at work, using employer's computers, and notwithstanding that user name and passwords were found on company computers); *Curto*, 2006 WL 1318387 at * 4-5 (discussing need for caution where two company-issued laptops were used by plaintiff in her home office, which were not connected to employer's computer server, and noting paucity of precedent in this mixed office/private environment); *Hilderman*, 551 F. Supp. 2d at 1203 (employee expected to be able to purchase his company-issued laptop). *Cf. Rozell* v. *Ross-Holst*, No. 05 CV 2936 (JGK), 2006 WL 163143 (S.D.N.Y. Jan. 20, 2006)(dispute over employer's right of access to employee's AOL account paid for by employers and used in part for work); *Van Alstyne* v. *Electronic Scriptorium, Ltd.*, 560 F.3d 199 (4th Cir. 2009) (finding a violation of the Stored Communication Act when a company improperly accessed an employee's personal email account (on AOL) that she had used "to conduct business from time-to-time"); *Guard Pub. Co.* v. *N.L.R.B.*, 571 F.3d 53 (D.C. Cir. 2009) (unfair labor relations practice in inconsistent enforcement of email policy against union organizer using company email system to communicate with other union members at company).

When the lines between personal and professional blur, the extent to which employees understand the scope of such policies or consent to be bound by such policies also comes into doubt. Petitioners themselves recognize that the expectation of privacy may vary depending on whether the officers using the pagers were off duty or on. (Pet'r Br. 31.) In *Pure Power Boot Camp*

Inc., 587 F. Supp.2d 548, the court noted that "[i]mplied consent, at a minimum, requires clear notice that one's conduct may result in a search being conducted of areas which the person has been warned are subject to search." *Id.* at 561. Where the employee merely left his personal email account password and username on company computers, the court thus "reject[ed] the notion that carelessness equals consent". *Id.* at 561. Although said of a waiver for failure to secure a password to a private email account, the same logic could easily apply to all unread workplace privacy policies. *Curto*, 2006 WL 1318387 at * 6 ("[n]ot only is the wording in the policy at issue ambiguous as to whether [employer] will conduct audits, because Plaintiff worked at home, ...any such monitoring would have had to be preceded by notice to Plaintiff.").

In the context of a Fourth Amendment inquiry into a school teacher's expectation of privacy in her emails, *Brown-Criscuolo* set forth the following four-part test:

> (1) does the corporation maintain a policy banning personal or other objectionable use, (2) does the company monitor the use of the employee's computer or email, (3) do third parties have a right of access to the computer or e-mails, and (4) did the corporation notify the employee, or was the employee aware, of the use and monitoring policies?

601 F. Supp. 2d at 449, citing *In re Asia Global Crossing, Ltd.*, 322 B.R. at 257-58. In this case, the OPD had a formal policy covering emails on the network but no formal policy concerning use of the pagers and related

texts transmitted outside the OPD network. To the extent there was an informal policy announced at a meeting (which Officer Quon said he did not recall) extending the privacy rules to the pagers, the existence of that informal policy would have to be reconciled with the actual practice of allowing officers (not simply Officer Quon) to preserve privacy rights simply by paying for overages. Although there is, as yet, no uniformity among the precedents on how to define the scope of employee privacy, the suggestion of the United States Government (Amicus Br. 14), that employees have no privacy rights except those granted by the employer is at odds with a considerable and growing body of precedent that the employer (public or private) must define the scope of its own needs, provide notice to the employee, and then act in accordance with its policy by enforcing it with some consistency. (*See* Pet'r Br. 29, suggesting a sender or recipient of text messages on a government employer's equipment may never have a legitimate expectation of privacy.)

C. *It Is Not Yet Possible to Assess What Scope of Employee Privacy "Society Is Prepared to Accept"*

Petitioners' contend that a "reasonable expectation of privacy" is best defined as "one that society is prepared to accept" (Reply in Supp. of Pet. for Cert. 9). Yet, the emerging body of statutory and regulatory guidelines, and case law precedents (which are often in conflict) suggests that no clear pronouncement can now be made whether or to what extent society has made any judgments as to the reasonableness of the expectation of privacy in most new forms of

communications, data collection and storage. Although the basic proposition is clear that reasonable employer workplace rules can and will be enforced, at the margins continued evolution of the law in this area will no doubt yield a clearer picture. Employers remain free in the meantime to experiment with new and differing policies. Consistent with the case-by-case approach endorsed in *O'Connor* v. *Ortega*, there is no need to draw any broad rules now.

At least two states, Delaware and Connecticut, recently have enacted statutes requiring notice of monitoring of employees' electronic communications. DEL. CODE ANN. Tit. 19, § 705 (2010); CONN. GEN. STAT. ANN. § 31-48D (West 2010). Likewise, as the court noted in *Stengart:* "Here we make no attempt to define the extent to which an employer may reach into an employee's private life or confidential records through an employment rule or regulation. *Ultimately these matters may be a subject best left for the Legislature.*" 973 A.2d at 401. In short, federal and state law (statutory and common law) continue to evolve, creating an uncertain foundation on which to decide whether there has been any "societal judgment" on reasonableness.

In a related field of privacy protection, the Federal Trade Commission currently is considering possible rule-making to govern collection of personal data regarding internet use, so as to require heightened standards of "notice and consent" before such data regarding individual usage patterns can be used in targeting advertising at internet users. *See e.g.* FTC Staff Report, *Self Regulatory Principles for Online Behavioral Advertising* (February 2009), *available at:*

http://www/ftc/gpv/os/2009/02/P085400behavadreport.pdf. Expressing concern that there be fair notice and choice, the FTC states:

> Every website where data is collected for behavioral advertising should provide a clear, concise, consumer-friendly, and prominent statement that (1) data about consumers' activities online is being collected at the site . . . and (2) consumers can choose whether or not to have their information collected for such purpose. The website should also provide consumers with a clear, easy-to-use, and accessible method for exercising this option.[8]

See In re Sears Holdings Management Corp. v. FTC, No. C-4264 F.T.C. 082 3099 (Settlement announced June 4, 2009) (Sears over-reaching in collecting personal data concerning individuals' on-line browsing activity without proper notice and consent).

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8. The FTC is currently engaged in Town Hall fact finding meetings to determine the extent to which individuals may need to assent affirmatively to tracking of their on-line behavior. David Vladeck, director of the FTC's Bureau of Consumer Protection, recently explained: "We're worried that consumers don't really know what information about their online browsing is being tracked . . . So our goal is to figure out how we can inject greater transparency, accountability and consumer control into this process." 15 *Electronic Commerce & Law Report* 145 (BNA Jan. 27, 2010). FTC Chairman Jon Liebowitz is also quoted as supporting "opt-in" consent as a condition to collecting and using such data. *Id.*

In determining what scope of employee privacy society is prepared to accept, what level of access employers genuinely need, or how to balance the two, some empirical research would be relevant to show (i) the extent to which employers have and enforce written policies; and (ii) the levels of employee awareness and understanding of or adherence to such policies. More comprehensive research of the nature and extent of abuses of such policies would also illuminate the actual risks presented to employers and employees, which may well vary by the nature of the work environment; by the nature of the industry, by levels of employee seniority or responsibility, and so forth. However, the record is bereft of such information. Although such empirical research might be most appropriate as a subject for legislative rather than judicial review, the difficulty of making any pronouncement whether there has been any "societal judgment" on reasonableness of employee expectations or the extent of employee or employer expectations, counsels caution in rendering any broad decision now.

D. *The Potential for Public Review Under Public Records Laws Differs Little From Electronic Discovery Rules in Setting Expectations of Privacy*

The NYIPLA does not express an opinion on the interpretation of the California Public Records Act ("CPRA") (CAL. GOV'T CODE § 6250 et seq.) or whether it precludes a finding that Respondents had a reasonable expectation of privacy in their text messages. Nonetheless, the NYIPLA believes it appropriate to comment on the parallel between the risk of potential

exposure under public records laws in the government employment context and the risk of potential exposure of otherwise non-public communications and other records under emerging practices governing electronic discovery, a risk that confronts both government and private employers and employees. *See Brown-Criscuolo*, 601 F. Supp.2d at 449-50 (reasonable expectation of privacy in school teacher's password-protected email files notwithstanding that school privacy policy specified that such records "may be discoverable" under Connecticut public records laws).

As ever-more electronic records are created by employees on mobile devices and in Web 2.0 interactive applications, employers increasingly are required to develop internal rules of document management (even in the face of radically reduced storage costs for electronic records). Somewhat paradoxically, incentives also increasingly arise for employers to *decline* to exercise control over certain such technologies, lest essentially private communications become part of the company records. Courts now are asked to decide whether businesses should be required to preserve and produce records created by employees when not physically at work and when, arguably, not within the scope of their employment duties. Were Officer Quon to have used his pager to express his personal disapproval of certain office policies, or to comment on other matters internal to the OPD but of public concern, difficult questions could arise whether his personal views were a fair subject of potential disclosure by virtue of nothing more than the fact that he used the most convenient device available as a tool to express (privately) his personal views. *See, e.g., Pietrylo*, 2008 WL 6085437

(employee created MySpace account for other employees to vent criticisms of the employer). *Accord*, *Konop* v. *Hawaiian Airlines, Inc.*, 302 F.3d 868 (9th Cir. 2002).

The duty to preserve electronic records that may be requested in discovery reaches all electronic records within an employer's possession, custody or control, Federal Rules of Civil Procedure Rule 34, a duty defined broadly by the Advisory Committee. FED. R. CIV. P. 34 Advisory Committee's note. However, some courts, asked to order the production of electronic records, have begun to observe that simply because a record exists and can be retrieved does not make it sufficiently relevant to an area of legitimate inquiry to compel disclosure. *Rozell* v. *Ross-Holst*, 2006 WL 163143 at * 4; *Mackelprang* v. *Fidelity Nat'l Title Agency of Nev., Inc.*, No. 2:06-cv-00788, 2007 WL 119149 (D. Nev. Jan. 9, 2007). Federal Rules of Civil Procedure Rule 26(c) similarly gives courts discretion to limit discovery to prevent undue burden, embarrassment and the like. Just so, text messages exchanged by an officer such as Quon at or about the time of a SWAT intervention could be relevant and subject to disclosure in the face of a public inquiry about that incident, even if unrelated messages sent or received when off-duty were not. However, uncertainty as to the proper bounds of records fairly within an employer's control nonetheless may require (minimally) that such records be secured and maintained.

It may well be, as the Petitioner asserts, that an officer reasonably can anticipate department or public review of a shooting or other controversial incident. However, with the scope of relevant information defined,

it is possible to filter out plainly personal messages when searching for what is relevant. The need for review of messages exchanged proximate to a controversial event need not automatically sweep in messages sent at other times, when the officer is off-duty.[9] That there will always be a need for line drawing does not mean that lines should be drawn arbitrarily or without regard to actual expectations. The very basis for the holding in *O'Connor* was the recognition that such lines would have to be drawn on a case-by-case basis. Indeed, it is perhaps a tautology to observe that privacy is by its very nature idiosyncratic and uniquely personal. This in turn creates an incentive for private businesses and governmental bodies to clarify their own privacy policies, to educate employees on proper usage, and to monitor social and technical developments to use "best practices."

In a similar manner, in cases interpreting the Freedom of Information Act, this Court has often recognized and protected privacy interests in materials such as deportation records, *U.S. Department of State v. Ray*, 502 U.S. 164, 112 S. Ct. 541 (1991); investigatory photographs, *National Archives and Records Administration v. Favish*, 541 U.S. 157, 124 S. Ct. 1570 (2004), and previously published arrest information, *Department of Justice v. Reporters Committee for*

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9. Even independent of privacy issues, basic relevance-based line drawing reveals that simply because records exist in electronic format they can not automatically be subject to public disclosure. For instance, a public inquiry concerning a SWAT shooting incident on some given day need not compel public exposure of unrelated text messages the same day or even the same hour concerning a SWAT intervention in an unrelated private domestic dispute.

Freedom of the Press, 489 U.S. 749, 109 S. Ct. 1468 (1989). *See also, Bloomberg*, 357 F. Supp. 2d at 164 (SEC chairman's electronic calendar was not an "agency record" where agency permitted limited use of office equipment for personal needs); *Howell Educ. Ass'n. MEA/NEA* v. *Howell Bd. Of Educ.*, No. 288977, 2010 WL 290515 (Mich Ct. App. Jan. 26, 2010) (mere possession by the government of personal emails of public school employees does not render them public records under Michigan FOIA).

Line drawing between company or government data, on the one hand, and private data, on the other, is becoming and will continue to be critical, particularly as private companies and government entities seek to implement and maintain document retention policies. When an employee uses her office-issued computer to access a private email account to question company policy that even she has publicly upheld in her capacity as an employee, must the company produce such records in litigation? Must the employer store such records or place them under a litigation hold simply because the company may have the ability to monitor the personal email traffic? It is and will continue to be a matter of great concern whether businesses (including government entities) are responsible or (for purposes of Fed. R. Civ. P. Rule 34) have "control over" information stored in cloud computing; employee postings on Facebook, Twitter, LinkedIn and so forth. Similar questions may arise concerning personal data stored in separate folders on the hard drive of an office-issued computer, phone records from a cell phone paid for by the employer or instant-messages on an office-issued PDA.

As with private litigants, it is one thing for government employees to expect that such electronic records may be reviewed by a magistrate under the non-routine circumstance of a litigation or public records inquiry; it is another thing to say such records can or should be searched routinely or without cause or produced to third parties or adversaries. The mere "potential" for public review can not be the touchstone of a reasonable expectation of privacy as the Petitioners suggest (Pet'r Br. 40), because all electronic records can potentially become public – through unauthorized access or even lawful means, such as a potentially overbroad discovery response or inadvertent disclosure. Simply because privacy protection may be imperfect need not defeat the expectation entirely. That we all risk losing privacy protection does not mean we are unreasonable (despite the risks) in expecting otherwise. It is the reasonableness of the risk of lawful disclosure that is relevant, and here the analysis becomes entirely circular.

The NYIPLA shares completely the sentiment of Petitioners that "[t]his Court should take this opportunity to restore reasonableness and common sense to *O'Connor's* 'operational realities of the workplace standard.'" Where the NYIPLA has less confidence, however, is whether, on the facts and questions presented by this case, any broad rules can yet be enunciated as to when an individual has a reasonable expectation of privacy in a mobile communications device or other means of private communications using employer-provided equipment or networks not clearly delineated or enforced under the applicable company or government privacy policy. As the

United States notes in its amicus brief (Amicus Br. 18) employers (public and private) do face unique risks from networked devices. For just this reason, employers need to assess those risks and develop and implement policies consistent with their identified needs.[10] Employees who later disregard such policies may have little or no ground for complaint.

In *O'Connor*, this Court rejected "the contention . . . that public employees can never have a reasonable expectation of privacy in their place of work," 480 U.S. at 717, finding instead that "Given the great variety of work environments, . . . the question whether an employee has a reasonable expectation of privacy must be addressed on a case-by-case basis." *Id.* at 718. The variety and complexity of "work" environments today is changing so rapidly as to be unrecognizable to the *O'Connor* Court one generation ago. It will likely be equally unrecognizable to other courts another decade hence. For just these reasons, no broad rule is now appropriate nor can any certain or sweeping judgments be made what expectations employees have of privacy in such new and evolving circumstances or what "societal judgments" on reasonableness are appropriate.

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10. Similarly, although the amicus, National School Boards Association, expresses concerns regarding the ability of schools to monitor their teachers, it does not address the simple prophylactic that schools can develop and implement clear rules. Curiously, the brief nowhere mentions *Brown-Criscuolo* v. *Wolfe*, *supra*, recognizing in a Fourth Amendment context that a school teacher may have a reasonable expectation of privacy in her emails.

Consistent with *O'Connor*, this case is not an appropriate vehicle in which to adopt any broad rules governing workplace privacy rights in mobile communications devices or in the absence of a formal office policy of which employees have notice and which is enforced. As noted, the only policy here even arguably applying to the subject pagers was an informal verbal policy that was at odds with actual office practice. The record provides no evidence of instances in which the informal policy was actually enforced prior to the review of Respondents' email messages precipitating this litigation.

CONCLUSION

For the foregoing reasons, the holding of the Ninth Circuit should be affirmed or the matter should be remanded to resolve any uncertainties as to what was the policy and to what extent it was enforced.

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AMICUS CURIAE BRIEF

No. 08-1332

In The Supreme Court of the United States

CITY OF ONTARIO, CALIFORNIA, ET AL.,
Petitioners,

v.

JEFF QUON, ET AL.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

MOTION OF THE RUTHERFORD INSTITUTE FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENTS

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MOTION OF THE RUTHERFORD INSTITUTE FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF

Comes now The Rutherford Institute and files this motion pursuant to Sup. Ct. R. 37.3(b), for leave to file an *amicus curiae* brief in support of the Respondents in the above-styled case presently before this Court for oral argument.

In support of this motion, The Rutherford Institute first avers that it requested the consent to the filing of an *amicus curiae* brief from each of parties to this case, but consent was withheld by Respondent Debbie Glenn.

The Rutherford Institute requests the opportunity to present an *amicus curiae* brief in this case because the Institute is keenly interested in protecting the civil liberties of individuals from interference and infringement by the government. The issue presented in this case, the extent of protection afforded government workers by the Fourth Amendment, is an issue of pressing national concern in light of the expanding size of the governmental workforce and the ever-increasing time demands placed on such workers. It is crucial that the privacy interest of these workers be recognized and protected and that it is assured that citizens do not forfeit the fundamental protections of the Constitution when they accept government employment.

As a civil liberties organization, The Rutherford Institute and the brief set forth, *infra*, brings a discerning analysis to the issues presented in this case. The Institute specializes in protecting the constitutional rights of individuals and its experience in these matters will bring to light matters which will assist the Court in reaching a just solution to the questions presented.

Moreover, The Rutherford Institute specializes in advocating for individual rights and the proposed brief will allow the Court to better understand the interests of government employees, such as the Respondents, in securing their privacy. The Petitioner has already received the support of five *amicus curiae* briefs, and the Court will obtain a

more balanced analysis of the issues in this case if the Institute's brief in support of the Respondent is accepted.

Wherefore, The Rutherford Institute respectfully requests that its motion for leave to file an *amicus curiae* brief be granted.

Respectfully submitted,

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INTEREST OF AMICUS CURIAE[1]

The Rutherford Institute is an international civil liberties organization with its headquarters in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or infringed upon, and in educating the public about constitutional and human rights issues.

Attorneys affiliated with the Institute have represented parties and filed *amicus curiae* briefs in this Court on numerous occasions. Institute attorneys have a long history of filing briefs before this Court on a wide range of constitutional law questions, and are currently handling numerous cases of local and national import, including many cases that concern the interplay between government and citizens.

The Rutherford Institute is interested in the instant case because it will greatly affect the privacy interests of government workers and their ability to rely upon the actual practices and assurances of superiors with respect to the degree of privacy

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[1] Pursuant to Sup. Ct. R. 37.6, *amicus* certifies that no counsel for a party to this action authored any part of this *amicus curiae* brief, nor did any party or counsel to any party make any monetary contribution to fund the preparation or submission of this brief.

afforded in the workplace. Additionally, the Institute is interested in assuring that the rights of privacy are fully extended in the context of new technologies, including the kind of text messages at issue in this case.

STATEMENT OF FACTS

Amicus incorporates by reference the statement of facts set forth in the Respondents' Brief.

SUMMARY OF ARGUMENT

The Fourth Amendment has protected citizens in their homes since the founding days of these United States. In recent years, the workplace has become increasingly an extension of the home: people spend a significant percentage of their lives at the office, undertaking personal as well as work-related tasks. Our society recognizes this and requires affording workers a significant measure of privacy in the workplace absent clear disclaimers to the contrary by employers.

The reality in the modern workplace, both private and government, is that employers often tend not to discourage their employees from storing personal materials at work, browsing the internet for personal use during their breaks or after work, or engaging in other non-work related tasks. In other cases, even where official non-privacy policies do exist, employers do not often enforce them, or alternatively – as in the instant case – go as far as to

contradict them with assurances that official policies will not be enforced provided that certain conditions are met. It is the conflict between "official policy" and actual practices and assurances that is at the center of the dispute over an employee's right to privacy in this case.

Rather than establish an inequitable and unrealistic standard that makes purported official policy preeminent, this Court should reaffirm its existing precedent that Fourth Amendment rights, particularly those in government workplaces, must be assessed on a case-by-case basis looking to all the circumstances. Expectations of privacy turn on particular factual circumstances, which differ in significant ways from case to case and from workplace to workplace. As such, the current test, established in *Katz v. United States*, 389 U.S. 347 (1967) and its progeny – which requires a subjective expectation of privacy that is objectively reasonable, and demands that any breach of such a well-founded expectation by a government employer be justified – should be upheld and reaffirmed by this Court.

Thus, this Court should clarify that where a government employer contradicts its own official anti-privacy policy – formally or informally, explicitly or tacitly – the employer cannot reasonably expect courts to assess privacy interests on the basis of the stricter policy to the detriment of the employee. Employees' expectations are based upon their employers' daily practices and the treatment of those around them vis-à-vis monitoring, auditing of

messages, reading of e-mails etc., and this Court should explicitly recognize that fact in the case at bar.

ARGUMENT

I. The Right To Privacy Is Well-Established, And Is Not Automatically Voided In A Workplace Context

The question of how to balance Fourth Amendment rights is not always straightforward. However, the dissent in the court below – one which painted the reasoned decision of the majority as being "contrary to the dictates of reason and common sense" – erroneously portrays Fourth Amendment rights as obstacles to government efficiency in the workplace. *Quon v. Arch Wireless Operating Company, Inc.*, 554 F.3d 769, 779, denial of rehearing and rehearing *en banc* (9th Cir. 2009) (Ikuta J., dissenting).

The reality is far more nuanced. As the Fourth Amendment clearly enumerates, and as the common law has long recognized, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated." This fundamental right was heavily influenced by the English case of *Entick v. Carrington* [1765] EWHC KB J98, in which Lord Camden wrote: "The great end, for which men entered into society, was to secure their property." *Id.*

From *Entick v. Carrington* emerged a fundamental and inviolable proposition: government could not interfere with citizens' privacy without a proper legal justification. From that starting point emerged a jurisprudence in both England and the United States that fiercely protected unwarranted searches and seizures – firmly grounded in the belief of the architects of the Bill of Rights who "sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone – the most comprehensive of rights and the right most valued by civilized men." *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis J., dissenting).

In practice – as *Entick v. Carrington* openly acknowledged – the right to privacy is not absolute: it may be infringed where there is sufficient justification to do so. *Id.* In other words, the Fourth Amendment codifies a qualified right. Yet, as this Court clarified in *Katz*, 389 U.S. at 361 (Harlan, J., concurring), in effect overruling the holding in the earlier case of *Olmstead*, "the Fourth Amendment protects people, not places." *Katz*, 389 U.S. at 361 (Harlan J., concurring). The concurrence of Justice Harlan in *Katz*[2] went on to outline the test which has since been applied to determine whether or not a

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[2] The concurrence of Justice Harlan is widely regarded as the controlling opinion handed down in that case. *See, e.g. Smith v. Maryland*, 442 U.S. 735, 740-41 (1979) (discussing Justice Harlan's two-part test and citing cases).

person has a right of privacy protected by the Fourth Amendment:

> My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person has exhibited an actual (subjective) expectation, and, second, that the expectation be one that society is prepared to recognize as reasonable."

Id.

Under this two-part test, an individual first must show a subjective expectation of privacy in the area searched or the item seized, and then show that the expectation is one that society is prepared to recognize as reasonable. *Rakas v. Illinois*, 439 U.S. 128, 143 (1978); *United States v. Anderson*, 154 F.3d 1225, 1229 (10th Cir. 1998), *cert. denied*, 526 U.S. 1159 (1999). As the *Anderson* court acknowledged, any definition of what constitutes a reasonable expectation of privacy is likely to be determined by "all the surrounding circumstances," *id.*, though it is clear that any successful Fourth Amendment claim must be based upon a subjective expectation of privacy that is objectively reasonable. *Smith*, 442 U.S. at 740.

Application of these principles in the government workplace is controlled by this Court's decision in *O'Connor v. Ortega*, 480 U.S. 709 (1987). *O'Connor* left no doubt that the Fourth Amendment

applies to searches by government employers in public workplaces and made clear that the scope of employees' rights can be reduced or expanded by "the operational realities of the workplace." *Id.* at 717. In ruling that the operational realities of the government workplace "may make *some* employees' expectations of privacy unreasonable," the Court was clearly indicating that the assumption is that an expectation of privacy does exist. Thus, the decision went on to rule that "[p]ublic employees' expectations of privacy in their offices, desks, and file cabinets, like similar expectations of employees in the private sector, *may be reduced by virtue of actual office practices and procedures*, or by legitimate regulation." *Id.* at 717 (emphasis added).

II. The Modern Workplace Is Not Readily Distinguishable From The Home

As Justice Blackmun pointed out in *O'Connor*, the modern workplace and the home are not always easily distinguishable from one another; employees often spend time at work or during lunch breaks dealing not only with work-related business, but also personal tasks and private activities. Much of this derives from the tendency of employees to work longer hours, and as a consequence of the blurring of the two spheres, "the tidy distinctions between the workplace and professional affairs, on the one hand, and personal possession and private activities, on the other, do not exist in reality." *O'Connor*, 480 U.S. at 739 (Blackmun, J, dissenting). As the dissenters pointed out:

> [T]he reality of work in modern time, whether done by public or private employees, reveals why a public employee's expectation of privacy in the workplace should be carefully safeguarded and not lightly set aside. It is, unfortunately, all too true that the workplace has become another home for most working Americans. Many employees spend the better part of their days and much of their evenings at work. . . . Consequently, an employee's private life must intersect with the workplace[.]"

Id. at 739. If anything, this blending of home and work has increased since the decision in *O'Connor*.

These changes to how Americans are working today serve to illustrate how traditional home/work distinctions have been broken down, something that has been facilitated by the convenience offered by technology and its myriad applications. As a recent law journal article pointed out, even as of 1999, one in three workers surfed the internet for personal reasons during their work hours, and as of 2004, almost 21 million Americans worked from home; all of which makes it inevitable "that perhaps employees do not realize their communications on employer-provided laptops, cell phones and BlackBerries may be monitored for their content." Justin Conforti, *Somebody's Watching Me: Workplace Privacy*

Interests, Technology Surveillance, And The Ninth Circuit's Misapplication of the Ortega Test in Quon v. Arch Wireless, 5 Seton Hall Circuit Rev. 461, 462-63 (2009).

In addition, every month, users of cell phones in the United States send 110 billion text messages (more than the number of phone calls made each month); text messages are widely used by more than 270 million Americas to "vote for their American Idols, remind their political constituents to vote, send their friends and relatives holiday greetings, order pizzas, and learn about their travel delays." Alyssa H. DaCunha, *Txts R Safe 4 2Day: Quon v. Arch Wireless and the Fourth Amendment Applied to Text Messages*, 17 Geo. Mason L. Rev. 295, 295 (2009).

All of this adds up to a world in which electronic media are frequently used to convey a wide range of messages in various contexts. It is therefore not surprising that users expect different levels of privacy in their communications: a private photograph taken on a cell phone will likely be more private by nature than a text about what some movie a person is planning to see. It is these varying degrees of what one author terms "privacy expectations" that create and lead to "different Fourth Amendment conclusions about the legality of a search." Matthew E. Orso, *Cellular Phones, Warrantless Searches, and the New Frontier of Fourth Amendment Jurisprudence*, 50 Santa Clara L. Rev. 101, 105 (2010).

And it is precisely these differences in expectations that led this Court in *O'Connor* to articulate a case-by-case approach: it is not the location taken alone which determines whether there is a reasonable expectation of privacy; the nature of the communication itself must play a part in establishing whether that expectation can exist. And, most crucially, the "actual office practices and procedures" determine whether an employee has a legitimate expectation of privacy. *O'Connor*, 480 U.S. at 717.

III. Employees' Expectations of Privacy May Be Enhanced Or Reduced By Workplace Operational Realities

As the Seventh Circuit has noted, based on its reading of *O'Connor*, "the idea that one could conduct confidential business at work, and have an expectation of privacy when doing so, is not per se unreasonable." *Narducci v. Moore*, 572 F.3d 313, 320 (7th Cir. 2009). Given the "operational realities of the workplace", and the "great variety of work environments in the public sector," the *O'Connor* court mandated a "case-by-case approach to determining whether an employee has a reasonable expectation of privacy" in the workplace. *O'Connor*, 480 U.S. at 717-18.

Such an approach essentially highlights how a range of situational factors must be taken into account when examining the objective and subjective

strands of this Court's test as laid out in *O'Connor* and subsequent cases; the expectation of privacy of government employees may be tempered or reduced "by virtue of actual office practices and procedures, or by legitimate regulation." *Id.* at 717.

One framework adopted in considering whether the employer has limited its employees' reasonable expectation of privacy is the four-factor test laid out in *In re Asia Global Crossing, Ltd.*, 322 B.R. 247 (Bankr. S.D.N.Y. 2005), which was also adopted in *Brown-Criscuolo v. Wolfe*, 601 F.Supp.2d 441 (D.Conn. 2009), a case involving a public school employee. The factors relied upon in those cases were: "(1) does the corporation maintain a policy banning personal or other objectionable use, (2) does the company monitor the use of the employee's computer or e-mail, (3) do third parties have a right of access to the computer or e-mails, and (4) did the corporation notify the employee, or was the employee aware, of the use and monitoring policies?" *In re Asia Global Crossing, Ltd.*, 322 B.R. at 257.

The last of these factors is the one which has been identified as the most significant by courts of appeals when making determinations regarding what constitutes reasonable interference with employees' Fourth Amendment rights, and has frequently proven instrumental in resolving the issue.

For example, in *United States v. Angevine*, 281 F.3d 1130 (10th Cir. 2002), the Tenth Circuit held that an employee could have no reasonable

expectation of privacy because when he turned on his computer, a "splash screen" displayed the message that private communications were subject to monitoring and were not confidential. *Angevine*, 281 F.3d at 1133.

In *United States v. Ziegler*, 474 F.3d 1184, 1191-92 (9th Cir. 2007), the Ninth Circuit also held that even where an employee has a subjective expectation of privacy (because his computer was password protected) that was objectively reasonable (he didn't share the office with anyone else), because of a range of opposing factors – IT employees had complete administrative access to anybody's machine, the company had a firewall in place to monitor traffic and monitoring was routine, and upon joining the company, employees were told that "computers were company-owned and not to be used for activities of a personal nature" – the employer could consent to a government search of the computer without infringing on Ziegler's Fourth Amendment rights.

The Fourth and Seventh Circuits have taken similar approaches in holding that employer-implemented anti-privacy policies are capable of overcoming an employee's reasonable expectation of privacy. *See, e.g. United States v. Simons*, 206 F.3d 392, 395 (4th Cir. 2000), and *Muick v. Glenayre Elecs.*, 280 F.3d 741, 743 (7th Cir. 2002) ("Glenayre had announced that it could reasonably inspect the laptops that it furnished for the use of its employees,

and this destroyed any reasonable expectation of privacy").

Conversely, in *Leventhal v. Knapek*, 266 F.3d 64 (2d Cir. 2001), the court found that where there is no anti-privacy policy in place, and no general practice of routine searches of employee computers, employees have a reasonable expectation of privacy. *Id.* at 74. There, the Court held:

> [An] infrequent and selective search for maintenance purposes or to retrieve a needed document, justified by reference to the "special needs" of employers to pursue legitimate work - related objectives, does not destroy any underlying expectation of privacy that an employee could otherwise possess in the contents of an office computer.

Id. at 74.

IV. This Case Does Not Fit Comfortably Into The Fourth Amendment Analysis Of The Circuit Courts Nor This Court's Prior Case Law

In the court below, the Ninth Circuit found that there was "no meaningful distinction" between e-mails, text messages, and letters. *Quon v. Arch Wireless Operating Co.*, 529 F.3d 892, 905-06 (9th Cir. 2008). Such a holding is highly significant,

representing as it does the first case from the circuit courts on the question of whether the Fourth Amendment's protections extend to text messages in addition to e-mails.

In particular, the court below recognized that employees have the same expectation of privacy in e-mails and text messages, notwithstanding the fact that both are stored as electronic media, and might be considered more "public" than the written messages contained in letters. As such, under this ruling, government employers cannot evade Fourth Amendment protections simply because the medium of communication more easily lends itself to – and tends to be used more freely for purposes of – surveillance.

V. Sergeant Quon Had A Reasonable Expectation Of Privacy In His Text Messages

The court below found that Sergeant Jeff Quon had a reasonable expectation of privacy in his text messages. *Quon*, 529 F.3d at 908. Its finding was based on the fact that the Ontario Police Department had a practice of permitting its employees to pay their overage charges, which made it reasonable for Quon to have a legitimate expectation of privacy in his texts. *Id.* Moreover, the court below clarified the point that although the City had a general anti-privacy policy in place, it did not have a formal, written policy governing the use of the pagers used by its SWAT team members. *Id.* at 896.

Further, the general anti-privacy policy that Quon signed was put in place before the advent of pagers in the department, and was, by its terms, a policy governing only "Computer Usage, Internet and E-mail Policy." *Id.* The closest the department came to instituting a policy concerning pager privacy was at a meeting on April 18, 2002, "during which Lieutenant Steve Duke, a Commander with the Ontario Police Department's Administration Bureau, informed all present that the pager messages were considered e-mail, and that those messages would fall under the City's policy as public information and eligible for auditing." *Id.* (internal quotes omitted).

Although the department had promulgated no official policy governing the use of pagers, it did have an informal policy; employees who exceeded the 25,000 character-per-month limit were allowed to pay the overage charge themselves and thereby maintain the privacy of those messages. *Id.* at 897. As Lieutenant Duke (the same department official whose statement is relied upon as the basis for extending the general policy on computer usage to text messages) stated for the record: "[t]he practice was, if there was overage, that the employee would pay for the overage that the City had ... [W]e would usually call the employee and say, 'Hey, look, you're over X amount of characters. It comes out to X amount of dollars. Can you write me a check for your overage[?]'" *Id.*

Furthermore, the record reflects that Lieutenant Duke expressly told Quon that "it was not his intent to audit employee's [sic] text messages to see if the overage is due to work related transmissions" and that if he (Quon) paid the overage charges, Duke "would not have to audit the transmission and see how many messages were non-work related." *Id.*

It is clear that even if the written policy concerning computer, internet and e-mail privacy was orally extended by Lieutenant Duke to pager text messages, Duke's stated assurances to Quon that his texts would not be audited, provided Quon paid the overage charges, effectively undermined the viability of the no-privacy policy as it applied to text messages. In light of the oral assurance given to Quon by Duke, it is natural and entirely reasonable that Quon should believe that his texts would not be audited.

Moreover, as the court below pointed out, "Quon went over the monthly character limit three or four times and paid the City for the overages." *Id.* at 897. This established a precedent which Quon certainly relied upon in sending private messages each month, and caused him to trust his supervisor's assurances that, provided he paid the overage charges, he would not be audited. Indeed, it was only in August 2002 (after several months of Quon paying the charges as directed, in order to maintain the privacy in his private messages) that his messages were audited. *Id.* at 897-98.

Prior to August 2002, the City had no history of auditing employees' pager records, and the record does not detail any previous departmental history of employees' phone or e-mail records being investigated or audited in any manner other than in one separate case.

Furthermore, although employees were required to sign the blanket privacy policy upon joining the department, the record below does not indicate that an anti-privacy warning banner (such as those discussed in other cases above) was displayed upon their hand-held pagers each time the device was switched on. Nor does the record suggest that employees were under the impression that their devices would be routinely monitored or audited. This was partly due to the fact that the department did not have the means to audit the pagers itself, but instead had to contact Arch Wireless and request them to generate a copy of the transcripts of messages. *Quon v. Arch Wireless Operating Co., Inc.*, 445 F. Supp. 2d 1116, 1124 (2006).

The facts of this case stand in stark contrast to other cases, such as *Ziegler*, 474 F. 3d at 1191-92, in which the Ninth Circuit held that any expectation of privacy held by employees had been defeated by numerous factors, including the company's regular monitoring of workplace computers, the existence of an anti-privacy policy informing them that monitoring would occur, and distribution among the employees of a policy stating that any use of work

computers for private purposes would defeat any expectation of privacy they could reasonably have. *Id.* at 1191.

By contrast, in *Leventhal v. Knapek*, *supra*, a case more similar to the instant case, the Second Circuit found that a state employee had a reasonable expectation of privacy in his computer and matters contained therein despite the existence of an official policy prohibiting the use of state equipment for personal business. The court there pointed out that there was no general practice of the state agency to routinely search employee computers and had not made clear that employees had no right of privacy in the computers. Moreover, the agency had no policy prohibiting the storage of personal matters on employee computers. *Leventhal*, 266 F.3d at 74.

To the same effect, the Sixth Circuit has ruled that employees had a reasonable expectation of privacy, where the City "did not routinely monitor officer's pagers or give notice to officers that random monitoring of their department-issued pagers was possible", and where the official policy against personal use of pagers "had not been enforced." *Adams v. City of Battle Creek*, 250 F.3d 980, 984 (6th Cir. 2001).

In these cases, the courts have addressed situations in which employers' acts have caused what the *Ziegler* Court termed "societal expectations" to be altered, irrespective of anti-privacy policies the employer may have had in place, and often in direct

contravention of those policies. What the case law makes apparent is that no one single factor – including the existence of an anti-privacy policy to which an employee has consented – is dispositive in determining whether an employee has a reasonable expectation of privacy that has been breached without adequate justification. As the Seventh Circuit helpfully put it:

> The touchstone of Fourth Amendment inquiry is reasonableness, a standard measured in light of the totality of the circumstances and determined by balancing the degree to which a challenged action intrudes on an individual's privacy and the degree to which the action promotes a legitimate government interest.

Green v. Butler, 420 F.3d 689, 694 (7th Cir. 2005).

In the instant case, the oral assurances of Lieutenant Duke served to limit the effect of the department's written anti-privacy policy and created an expectation of privacy for Quon that was objectively reasonable. This is especially true given the fact that the "official" policy did not, by its terms, extend to pager text messages and the only basis for extending the policy to text messages is an announcement by Lieutenant Duke himself. Thus, it was certainly reasonable for Quon to rely upon the specific assurance of Lieutenant Duke regarding the practice applicable to pagers and that they would not

be audited if overages were paid for. This was the department's actual practice upon which employees like Quon came to rely and which should be the standard for deterimining the objective reasonableness of his expectation of privacy.

As the trial court found in holding that Quon had a legitimate expectation of privacy:

> Here, Lieutenant Duke's actions eroded any attempt on defendant's part to lessen the expectation of privacy its employees had in the use of the pagers issued to them; indeed, his actions could be said to have *encouraged* employees to use the pagers for personal matters. *See* [*O'Connor*], 480 U.S. at 719 (holding employee had a reasonable expectation of privacy where there was no evidence that the Hospital had established any reasonable regulation or policy discouraging employees . . . from storing personal papers and effects in their desks or file cabinets.

Quon, 445 F.Supp. 2d at 1142. (emphasis in original).

VI. The Department Had No Justification For Auditing Quon's Pager Without His Consent

As discussed above, once a reasonable expectation of privacy has been established, the next

point of inquiry is whether there was a justification behind the employer's infringement of the employee's privacy; or as this Court phrased the test, whether the measures adopted were "reasonably related to the objectives of the search and not excessively intrusive in light of ... the nature of the [misconduct]." *O'Connor*, 480 U.S. at 726. (internal quotes omitted). Once again, resolution of this question requires a balancing exercise and must turn on the facts specific to each case. As Professor Orin Kerr has written:

> [A] true balancing of interests requires context. To know the costs and benefits of using an investigative method, we need to know the overall threat to civil liberties and how much the technique's use will advance government interests in the contexts in which the technique will actually be used.

Orin Kerr, *Do We Need a New Fourth Amendment?* 107 Mich. L. Rev. 951, 963 (2009).

The court below resolved this second question by reference to the fact that "the Department opted to review the contents of *all* the messages, work-related and personal, without the consent of Quon", and stated that because of that fact, the search was "excessively intrusive in light of the non-investigatory object of the search." *Quon*, 529 F.3d at 909. (emphasis added).

Under the standard laid out in *O'Connor*, a search is reasonable "at its inception" if there are "reasonable grounds for suspecting . . . that the search is necessary for a noninvestigatory work-related purpose such as to retrieve a needed file." *O'Connor*, 480 U.S. at 726. As the trial court and the Ninth Circuit acknowledged, the auditing of Quon's messages was to determine whether the character allowance given to employees was adequate, or whether they were being asked to pay for work-related texts, and as such, was a "legitimate work-related rationale." *Quon*, 529 F.3d at 908.

However, the Ninth Circuit went on to hold that the search was "not reasonable in scope" under the "operational realities" standard established in *O'Connor*, stating as follows:

> Because the Department opted to review the contents of all the messages, work-related and personal, without the consent of Quon, . . . the search was excessively intrusive in light of the noninvestigatory object of the search . . . [and] based on our conclusion that Quon's reasonable expectation of privacy in those messages was not outweighed by the government's interest . . . as found by the jury in auditing the messages.

Quon, 554 F.3d at 772. (9th Cir. 2009).

The Ninth Circuit was clearly right in finding that the government's interest did not outweigh Quon's right to privacy in the content of his texts. Even taking the Department's assurances at face value (which we must since the jury did so), the purpose of the audit of Quon's text history was to ascertain whether or not the department allowed its officers a sufficient allowance of work-related texts every month.

The reason the court below appeared to employ the "least intrusive means" test was simply because it discussed the other methods the Department could have used to investigate Quon's messages. *Id.* at 772-73. It was by reference to these less intrusive methods that the court below was able to determine that the government's interest in auditing Quon's texts in the way that it chose was disproportionate when balanced against Quon's reasonable expectation of privacy. *Id.*

This Court's rejection of the least intrusive means test does not prevent courts from considering whether the method of government interference with employees' Fourth Amendment rights was disproportionate or whether it outweighed an employee's right to privacy. To suggest otherwise would be to prevent courts from determining, by reference to similar situations, how the balance of interests should be set, and would make the standard articulated by this Court in *O'Connor* unworkable. Moreover, as the Ninth Circuit noted, the instant

case does "not involve a 'special needs' search." *Id.* at 773.

Accordingly, it is impossible to see how the Department could have been able to read the contents of all of Quon's text messages without infringing his Fourth Amendment rights; the most cursory of examinations would have revealed which numbers were private and which were work-related (for example, by looking at one number to which numerous texts had been sent and briefly determining the nature of the message's contents), and there should have been no need for the employer to read every other text sent to that number once he had established that it was personal by nature.

CONCLUSION

The foregoing discussion makes apparent the reasons why Fourth Amendment cases such as this one can be properly resolved only by reference to the particular facts of each case, and cannot be determined solely through the use of a simple, catch-all test. Although this Court has expressed its dissatisfaction on past occasions with the case-by-case approach to resolving Fourth Amendment issues[3], there is no alternative, reliable litmus test to which cases can be subjected and fairly resolved.

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[3] *See, e.g. Oliver v. United States*, 466 U.S. 170 (1984), in which this Court opined that it "repeatedly has acknowledged the difficulties created for courts, police, and citizens by an ad hoc, case-by-case definition of Fourth Amendment standards to be applied in differing factual circumstances." *Id.* at 181.

One thing is clear: employers must be clear and consistent with their anti-privacy policies, where they decide to implement such policies. This case illustrates that employees' expectations are dictated by real-world factors – such as being told their text messages will not be audited, despite an official policy to the contrary, or the absence of frequent auditing in the workplace – rather than any contradictory non-specific policies an employer may have in place.

As such, this Court should affirm the judgment below and hold that Quon had a reasonable expectation of privacy in the texts sent from his government-owned pager and that the Fourth Amendment was violated when the texts were audited without his consent.

Respectfully submitted,

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